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Submitted Electronically Via Regulations.gov

Andrew Wheeler
Acting Administrator
Water Docket
United States Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments of the State of North Dakota on the Proposed *Definition of "Waters of the United States" – Recodification of Preexisting Rule* (Docket ID No. EPA-HQ-OW-2017-0203; COE-2017-0005-0004)

Dear Acting Administrator Wheeler:

On behalf of the State of North Dakota, I am submitting these comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) (collectively Agencies) proposed Definition of "Waters of the United States" – Recodification of Preexisting Rule (Proposed Recodification Rule), published on July 12, 2018 (83 Fed. Reg. 32227). The States of Alaska, Nebraska and Montana also join in North Dakota's comments.

The primary purpose for these comments is to explain that the Agencies statutory and constitutional jurisdictional overreach in the 2015 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (the 2015 Rule), impinges on North Dakota's (and its sister states) sovereign authority over land and water use. North Dakota, Alaska, Montana and Nebraska vigorously protect their State and local water resources, and the 2015 Rule's intrusion into this area of traditional State authority only serves to displace North Dakota, Alaska, Montana and Nebraska's expertise from the regulation of vital State land and water resources.

The North Dakota State Water Commission is responsible for water management and development throughout the State. The State Engineer as the secretary and chief engineer of the State Water Commission, regulates water appropriation, dikes and dams, drainage, and sovereign lands. The North Dakota Department of Agriculture is the lead state pesticide regulation agency, providing a fertilizer program, pesticide enforcement, a pesticide water quality program, and a state Waterbank program that helps producers conserve water on their lands and promote water quality. The North Dakota Department of Transportation manages the construction, operation,

and maintenance of transportation facilities to reduce impacts on water resources and drainage. The North Dakota Department of Health implements and enforces the State's various environmental regulatory programs and laws relating to the protection of State waters. The North Dakota Industrial Commission conducts and manages certain utilities, industries, enterprises, and business projects established by state law and has regulatory authority over oil and gas, coal exploration, geothermal resources, paleontological resources, and subsurface minerals, including Class II, Class III, and Class VI injection wells. Taken together , the work of these North Dakota agencies provides strong protection for the integrity of the State's land and water resources.

For the reasons stated herein, the Agencies must work with North Dakota, Alaska, Montana and Nebraska within the cooperative federalism framework established by Congress in the Clean Water Act ("CWA") and promptly repeal the 2015 Rule.

I. INTRODUCTION

North Dakota, Alaska, Montana and Nebraska urge the Agencies to move forward with their proposed repeal of the 2015 Rule. In so doing, the Agencies should not simply recodify the definition of "navigable waters" that existed prior to the 2015 Rule. Rather, the Agencies should bring more certainty to CWA jurisdictional determinations by announcing that such determinations will be based on Justice Scalia's plurality opinion in *Rapanos v. U.S.,* 547 U.S. 715 (2006). This will put a stop not only to the endless debate over whether to apply the plurality's opinion or Justice Kennedy's concurrence in *Rapanos*, but also to the needlessly complex disputes over what constitutes a "significant nexus" between waters that are navigable in fact and non-navigable waters. The Agencies have the authority to define navigable waters and "waters of the United States" (WOTUS) in line with the *Rapanos* plurality, and should do so to finally bring a much-needed level of certainty to CWA jurisdictional determinations.

In addition, any final recodification must honor the Constitutional boundaries established by the Commerce Clause applicable to Congress and the CWA, and respect the sovereign authority of the States over State and non-navigable waters. Any recodification of the definition of navigable waters cannot grant to the Agencies jurisdiction not otherwise granted to Congress by the Constitution. In particular, the Commerce Clause does not allow Congress or the Agencies to impose federal jurisdiction over interstate waters that are unrelated to the interstate channels of commerce that the Constitution granted Congress the authority to regulate. A definition of navigable waters (or WOTUS) that categorically includes any interstate waters, even interstate waters wholly unrelated to waters that are navigable in fact, violates the Constitution.

II. THE AGENCIES' REQUEST FOR COMMENTS

In the Proposed Recodification Rule the Agencies propose to repeal the 2015 Rule and put in place the pre-2015 Rule regulations, and request comments on whether the "2015 Rule is consistent with the statutory text of the CWA and relevant Supreme Court precedent, the limits of federal power under the Commerce Clause as specifically exercised by Congress in enacting the CWA, and any applicable legal requirements that pertain to the scope of the agencies' authority to define the term 'waters of the United States,' " as well as comments "on any other

issues that may be relevant to the agencies' consideration of whether to repeal the 2015 Rule." 83 Fed. Reg. at 32249. The Agencies also invite the public to comment on whether the Agencies should "recodify the regulations currently being implemented by the agencies." Id. at 32231. In other words, both actions that the Agencies are proposing are appropriately open for comment: the repeal of the 2015 Rule, and its replacement via the re-codification of the regulations existing prior to the 2015 Rule.

North Dakota and its several sister states have already extensively briefed the full extent to which the 2015 Rule violates the CWA in *North Dakota v. EPA,* No. 3:15-cv-00059 (D.N.D. 2015), and North Dakota, Alaska, Montana and Nebraska's briefs are attached for the record. *See* Attachment A, *Plaintiff States' Memorandum In Support Of Motion For Summary Judgment*; Attachment B, *Plaintiff States' Reply In Support Of Motion For Summary Judgment.* North Dakota also attaches its prior comments on the 2015 Rule and the 2017 Proposal, and renews the same issues as a part of these comments. Attachment C, *Comments of the State of North Dakota on the Proposed Definition of Waters of the United States* (Docket ID No. EP-HQ-OW-2011-0880-15365); Attachment D, *Comments of the States of West Virginia, Wisconsin, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Utah, and the Commonwealth of Kentucky on the U.S. Environmental Protection Agency's request for comment on the definition of "waters of the United States"* (Docket ID No. EPA-HQ-OW-2017-0203-13716).

A summary of North Dakota, Alaska, Montana and Nebraska's position on the illegality of the 2015 Rule, and thus the need for its repeal, and a response to the Agencies' request for comments in the Proposed Recodification Rule are set forth below.

A. The 2015 Rule Violates the Clean Water Act

The Agencies request comments on whether the 2015 Rule violated the CWA and Supreme Court precedent by: failing to give "sufficient effect" to the term navigable in the CWA (83 Fed. Reg. at 32241); interpreting the term "significant nexus" in the 2015 Rule in a way that did "not comport with and accurately implement the limits on jurisdiction reflected in the CWA" (*Id.* at 32228); implementing the 2015 Rule in a way that "lacks sufficient statutory basis" (*Id.* at 32238); taking "an expansive reading of Justice Kennedy's significant nexus test" to expand their authority (*Id*. at 32240); defining "tributary" and "adjacent" so broadly "as to eliminate consideration of" factors required by "Justice Kennedy's opinion and the CWA" (*Id.* at 32241); incorrectly relying on lower federal court opinions upholding jurisdiction over some intermittent or ephemeral streams as support for including those features in the 2015 Rule (*Id*. at 32247); and unlawfully altering the CWA's policy objective of recognizing, preserving, and protecting the responsibilities and rights of States to manage water resources under Section 101(b) (33 U.S.C. § 1251(b)) (*Id.* at 32228, 42, 46-48).

The 2015 Rule violates the CWA in all of the above areas, including violating the statutory text of the CWA and Supreme Court precedent interpreting the jurisdictional limits of the CWA. Attachment A, at 12-28. The term "waters of the United States" requires discussion of the term it defines – "navigable waters." This has been made abundantly clear by the

Supreme Court's decisions in *SWANNC* and *Rapanos*. In *Rapanos,* both Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion rejected jurisdiction of waters based on a relationship to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" (547 U.S. at 739 (Scalia, J. plurality)) as such a relationship would sweep in waters "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the [CWA]'s scope in *SWANCC*." *Id.* at 781–82 (Kennedy, J. concurring).

The 2015 Rule ignored the plain language of the CWA by sweeping isolated waters and land features into their jurisdiction that have no, or at best only a remote, relationship to navigable waters. It is a "central requirement" of the CWA that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). In particular, the 2015 Rule unlawfully expanded the Agencies' jurisdiction in its creation of three new jurisdictional categories: including all "tributary" waters as *per se* jurisdictional (Attachment A, at 17); including all "adjacent" waters as *per se* jurisdictional (*Id.* at 21); and including waters determined on a "case-by-case" basis to have a "significant nexus" to other jurisdictional waters (*Id.* at 24). These three categories ignore the text of the CWA and depart significantly from the Supreme Court's direction in the *SWANCC* and *Rapanos* decisions.

In the 2015 Rule all three categories are defined based on their relationship to *all* (or any) interstate waters, regardless of navigability. *See* 80 Fed. Reg. 37054, 37104. Thus the 2015 Rule creates *per se* and case-by-case jurisdictional categories that are not tied to "navigable waters" as required by the CWA and the Constitution. Furthermore, all three of these categories can include land features that may exhibit "physical indicators of a bed and banks and an ordinary high water mark," but are often dry, intermittent, or ephemeral in practice and have no true relationship to navigable waters as required by the CWA. These categories represent exactly the types of sweeping overreach in jurisdiction that the CWA does not allow, and that the Supreme Court has explicitly rejected.

The unlawful jurisdictional overreach in the 2015 Rule also violates the CWA's textual requirement to preserve and protect the responsibilities and rights of States to manage water resources under Section 101(b) (33 U.S.C. § 1251(b)). Attachment A, at 26. The 2015 Rule fundamentally readjusts the federal-state balance of land and water use and asserts jurisdiction over the vast majority of the nation's water features by defining waters as jurisdictional when located within 4,000 feet of a covered tributary, or the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea. Attachment A, at 27. In the Proposed Recodification Rule the Agencies acknowledge that the 2015 Rule Economic Analysis' assumption that "100 percent of the stream jurisdictional determinations will be positive under the 2015 Rule," indicates "a significant expansion of jurisdiction over tributaries in some States . . . particularly those in the arid West," resulting in "significant expansions of federal jurisdiction over streams." 83 Fed. Reg. at 32246. Such a vast jurisdictional expansion clearly violates Section 101(b)'s mandate to preserve and protect the responsibilities and rights of States to manage their own water resources.

As the 2015 Rule represents a clear violation of the statutory authority granted to the Agencies by the CWA and clarified by Supreme Court precedent, the Agencies should repeal the Rule.

B. The 2015 Rule Violates the United States Constitution

The Agencies request comments on whether the Rule raises "significant constitutional questions similar to the questions raised by the Migratory Bird Rule," such as an intrusion on States' traditional and primary power over land use under the Tenth Amendment, as discussed in *SWANCC* (83 Fed. Reg. at 32241), and is in violation of the Commerce Clause by failing to have the "requisite effect on . . . channels of interstate commerce" (*Id.* at 32249). The Agencies also acknowledge that the 2015 Rule implicates due process concerns, noting that because of "the significant civil and criminal penalties associated with the CWA, it is important for the agencies to promote regulatory certainty while striving to provide fair and predictable notice of the limits of federal jurisdiction." *Id.* at 32237.

The 2015 Rule violates the United States Constitution in each area the Agencies request comment: (1) violating the Tenth Amendment's protection of States sovereign interests in regulating their land and water; (2) exceeding Congress's constitutional authority under the Commerce Clause; and (3) violating the Due Process Clause. Attachment A, at 29.

The 2015 Rule's overbroad assertion of authority over local land and water features with little to no connection to navigable-in-fact waters invades the Plaintiff States' sovereign authority in violation of their Tenth Amendment rights. The 2015 Rule allows the Agencies to act as a *de facto* federal zoning board in the same way that *SWANCC* and *Rapanos* expressly disallow, intruding into areas of land and water use that the States have traditionally regulated. Attachment A, at 29-30. As North Dakota noted in its comments during the 2015 Rule's promulgation, its relatively flat topography makes the vast majority of its lands subject to the Agencies jurisdiction under the 2015 Rule solely by their proximity to floodplains. *Id.* at 31. Furthermore, the 2015 Rule's inclusion of Prairie Potholes as jurisdictional sweeps vast areas of North Dakota into the Agencies' jurisdiction. *Id.* Prairie Potholes are often remote and have little to no connection to navigable waters, and are exactly the type of local land and water features that are properly under North Dakota's traditional and primary power regulatory authority under the Tenth Amendment. *Id.*

The 2015 Rule also exceeds Congress' delegable Commerce Clause authority. *Id.* at 33. The CWA is authorized by Congress's "traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.' " *SWANCC,* 531 U.S. at 172. Instead of basing the 2015 Rule's jurisdictional determinations on Congress' delegable Commerce Clause authority, the Agencies swept in local land and water features that are not navigable-in-fact and have only an extremely tangential, if any, connection to navigable-in-fact waters, including dry or ephemeral stream beds that might flow just once every one-hundred years. Attachment A, at 34. The 2015 Rule includes interstate waters the Agencies admit are non-navigable, and bases jurisdictional determinations for other waters off of a relationship to those same non-navigable interstate waters. *Id.* The 2015 Rule fails to provide, and indeed cannot provide, any rational basis for concluding that such isolated, local land and water features bear a

significant relationship to interstate commerce, and is in violation of Congress' delegable Commerce Clause authority. *Id.* at 33-37.

The 2015 Rule is unconstitutionally vague in violation of the Due Process Clause which requires that no one be "deprived of life, liberty or property, without due process of law." U.S. CONST., Amend. V. In the Proposed Recodification Rule the Agencies admit concern that the complexity of the "substantial criminal and civil penalties" in the 2015 Rule "create[] significant uncertainty for agency staff, regulated entities, and the public." 83 Fed. Reg. at 32237. The 2015 Rule's definition of "navigable waters" covers the vast majority of the water features in the United States, making it vague and essentially limitless. Attachment A, at 38. The 2015 Rule further relies on extremely sophisticated indicators and data sets for making jurisdictional determinations under the definition of "navigable waters" that are rarely, if ever accessible by the regulated public such as: remote sensing, desktop tools, historical maps, historical aerial photography, and satellite imaging. *Id.* at 38-40. Due to the 2015 Rule's vast definitional coverage and complicated jurisdictional criteria, a person subject to the Rule has no way to know whether their land contains a jurisdictional water.

C. The 2015 Rule was Promulgated in Violation of the Administrative Procedure Act

The Agencies request comment as to whether "any potential procedural deficiencies limited effective public participation in the development of the 2015 Rule." 83 Fed. Reg. at 32249. The APA requires that Agencies: (1) comply with notice and comment rulemaking; and (2) not promulgate a rule that is arbitrary and capricious and unsupported by the administrative record. *See* 5 U.S.C. § 500 et seq.; Attachment A, at 40. The Agencies violated both of these requirements in promulgating the 2015 Rule.

i. The 2015 Rule Violates Statutory Notice and Comment Procedures

The Agencies acknowledge in the Proposed Recodification Rule that the 2015 Rule included "distance-based limitations that were not specified in the proposal," and request comments on whether the "distance-based limitations mitigated or affected the agencies change in interpretation of similarly situated waters in the 2015 Rule." 83 Fed. Reg. at 32240-41. In one sentence the Agencies confirm in the Proposed Recodification Rule what North Dakota has argued since the 2015 Rule's promulgation: that the Agencies violated notice and comment procedures by building the jurisdictional reach of the term "navigable waters" around definitional changes never noticed in the Proposed Rule. Specifically, the Agencies violated the APA's notice and comment procedures by creating jurisdictional definitions for three categories of waters never noticed in the Proposed Rule: distance-based criteria affecting adjacent waters, distance- and connectivity-based criteria affecting case-by-case waters, and exclusions for farming and ranching uses. Attachment A, at 40-46.

ii. The 2015 Rule is Arbitrary and Capricious

The Agencies request comment on whether the 2015 Rule has a valid scientific basis, including whether: the Agencies incorrectly concluded that the Rule "would not significantly expand the jurisdictional reach of the CWA" and used an incorrect method to estimate the percent increase in overall jurisdiction (83 Fed. Reg. at 32243-44); too much emphasis was placed "on the information and conclusions of the Connectivity [Study][1]" in lieu of statutory and precedential limitations (*Id.* at 32241); and whether the 2015 Rule relied on "scientific literature without due regard for the restraints imposed by the statute and case law" (*Id.* at 32240).

North Dakota, Alaska, Montana and Nebraska have long maintained that the Connectivity Study (in the draft or final form) is insufficient for establishing the significance of any nexus between upstream waters that have a connection with downstream navigable waters. *See* Attachment A, at 47-51. It is a truism that upstream waters contribute to downstream waters, but that only establishes—at most—a "nexus" between the two and not the significance of that nexus as required by *Rapanos*. Attachment A, at 47. Establishing the Constitutional and statutory contours of the Agencies' CWA jurisdiction is not a scientific determination, and jurisdictional overreach that would ignore the applicable legal constraints cannot be justified with an appeal to science. Indeed, many of the "connections" described in great detail in the Connectivity Study are precisely the sort of isolated and tenuous connections rejected in *SWANCC* and *Rapanos* as inadequate to support a finding of CWA jurisdiction. *SWANCC*, 531 U.S. at 169-72; *Rapanos,* 547 U.S. at 731-39. Therefore, the Connectivity Study does not support or justify (and nor does it compel) the jurisdictional overreach of the 2015 Rule.

III. THE RECODIFICATION RULE SHOULD BE BASED ON THE FRAMEWORK OF THE RAPANOS PLURALITY

A central theme of the Proposed Recodification Rule is the importance of returning a reasonable level of certainty – and removing unnecessary uncertainty – from CWA jurisdictional determinations. 83 Fed. Reg. at 32228-31, 32237-40. Enhancing the certainty of CWA jurisdictional determinations is important legally, practically, and economically. CWA jurisdictional determinations have important environmental, economic and legal (both civil and criminal) consequences for the public, and injecting unnecessary uncertainty into these decisions only magnifies those consequences.

The Agencies' proposal to re-codify the regulations as they existed before the 2015 Rule, by itself, will not achieve the certainty the Agencies seek. The Agencies should go further and announce that they will make CWA jurisdictional decisions based on the practical criteria established by Justice Scalia's plurality in *Rapanos*. As Courts of Appeals across the country have not been consistent in deciding whether the plurality or the concurrence in *Rapanos* (or both) should apply, the Agencies have the flexibility to declare their intention to interpret the pre-2015 Rule regulations in accordance with the 2006 *Rapanos* plurality without having to

[1] Connectivity Study here refers to both the initial *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Draft Connectivity Study"), and published in final form over two months after close of the public comment period at 80 Fed. Reg. 2100 (Jan. 15, 2015) ("Final Connectivity Study").

revise pre-2015 regulations that were at issue in *Rapanos*.[2] *See United States v. Bailey,* 571 F.3d 791, 798-99 (8th Cir. 2009) (discussing myriad circuit court rulings failing to agree which opinion in *Rapanos* should apply, and concluding that the Agencies may appropriately apply either the plurality or the concurrence).

While the 2015 Rule far exceeded the Agencies' authority under either reading of *Rapanos*, applying Justice Scalia's plurality will provide some of the certainty the Agencies now seek in the Proposed Recodification Rule in two important ways. First, it will create more certainty by bringing to a close the long debate as to which *Rapanos* opinion should offer the primary guidance to the Agencies in jurisdictional determinations under the pre-2015 Rule: that of the plurality, or the concurrence of Justice Kennedy (though the practical differences between the two opinions are sometimes exaggerated). Second, certainty and predictability will be further improved by removing from CWA jurisdictional determinations the complex and often practically unworkable "significant nexus" test. Countless pages of rulemaking preambles, comments and briefs have been generated on this topic, including in the 2015 Rule and this Proposed Recodification Rule. Much of this debate has centered on waters whose connections to navigable-in-fact waters are, at best, speculative. This does not have to continue.

Unlike Justice Kennedy's significant nexus test, Justice Scalia's plurality opinion allows the Agencies to make jurisdictional determinations based on factors that are readily observable and verifiable in the field. Any average landowner, with a layman's understanding of the term navigable waters, can identify when a continuous surface connection is present between a water feature on their lands and a downstream, jurisdictional water. Justice Scalia's plurality opinion also avoids the need for the arbitrary, confusing, and legally insufficient definitions for "tributary," "adjacent," and "neighboring" waters in the 2015 Rule that attempt, unsuccessfully, to codify Justice Kennedy's needlessly complex "significant nexus" test.

This is not to suggest that Justice Kennedy's concurrence can be ignored. To the contrary, a path forward based on the plurality will in large measure over-lap with the concurrence (e.g., both insist that the term "navigable" is central to any analysis of WOTUS). The public will be well-served by the Agencies steering a clear course based on the *Rapanos* plurality, removing the unnecessary uncertainty over the appropriate standard, and eliminating and the confusion behind the Agencies' attempted codification of the significant nexus standard in the 2015 Rule.

IV. ANY RECODIFICATION RULE MUST STAY WITHIN BOUNDS SET BY THE CONSTITUTION

The Agencies request comment on "on any other issues that may be relevant to the agencies' consideration of whether to repeal the 2015 Rule," including "options for revising the definition of 'waters of the United States'." 83 Fed. Reg. at 32249. A key issue, recognized by the Agencies, is that any definition of "navigable waters," and thus WOTUS, must fit within the confines established by the Constitution. The Agencies have thus explicitly opened for comment

[2] It may be that the Agencies, at some future point, may wish to initiate yet another rulemaking to codify the plurality opinion in *Rapanos*. However, such a codification rulemaking is not necessary for the Agencies, at this time, to announce their intention to apply the plurality opinion in CWA jurisdictional determinations.

the scope of their jurisdiction over interstate waters through their repeated invitations in the Proposed Recodification Rule requesting comments on: repealing the 2015 Rule; recodifying prior rules; and options for revising the definition of WOTUS. 83 Fed. Reg. at 32228, 42, 46-49. The Agencies also opened this issue during the rulemaking for the 2015 Rule. Attachment A, at 25; Attachment B, at 12-13.

A "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). This requirement is rooted in Congress's Commerce Clause authority, which is constrained to regulating "Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. The Agencies recognize this limitation on their power granted by Congress, noting that "Congress' authority to regulate navigable waters derives from its power to regulate the 'channels of interstate commerce' under the Commerce Clause." 83 Fed. Reg. at 32233. The Supreme Court has also been well aware of the interplay between the Constitution limits and the Agencies' efforts to extend their CWA jurisdiction. *See SWANCC*, 531 U.S. at 173 (rejecting the Corps' interpretation of the CWA, in part, for implicating "significant constitutional questions" including Commerce Clause concerns); Attachment A, at 25, 33-36; Attachment B, at 10.

The Proposed Recodification Rule summarizes several Supreme Court cases that apply the Commerce Clause to disputes over navigable waters, highlighting that the use of such waters for purposes of commerce is proper under the Commerce Clause. 83 Fed. Reg. at 32233. The Proposed Recodification Rule also notes that these cases allow jurisdiction over activities necessary to protect channels of commerce, such as controlling non-navigable portions of a waterway in order to preserve commerce on navigable portions. *Id*. However, a central and necessary element in all of the cases discussed is a significant connection between the waters at issue and "channels of commerce." Non-navigable interstate waters are not "channels of interstate commerce." It is incorrect to conclude that an intermittent or ephemeral stream crossing a state line, or an isolated wetland located on a state line that does not connect to a navigable water has a relationship to Congress's Commerce Clause authority. To conclude otherwise reads the term "navigable waters" out of the CWA.

Any attempt by Congress or the Agencies to exercise CWA jurisdiction over non-navigable interstate waters (i.e., interstate waters that, under existing Supreme Court precedent, do not have a sufficient connection to channels of commerce) violates the Commerce Clause of the Constitution. Therefore, the Agencies must not, in any final recodification rule, include 33 C.F.R. § 328.3(a)(2), which would impose Federal jurisdiction on a categorical basis over any interstate waters, without a requirement that such waters be considered navigable under applicable Supreme Court precedent. Recodifying 33 C.F.R. § 328.3(a)(2) as it existed in the pre-2015 Rule would violate the Constitution.

IV. CONCLUSION

The States of North Dakota, Alaska, Montana and Nebraska urge the Agencies to: fully repeal the 2015 Rule; explicitly announce their intention to apply the *Rapanos* plurality to future jurisdictional determinations; and to recodify the regulations that existed before the 2015 Rule by

removing provisions that violate the United States Constitution, including 33 C.F.R. § 328.3(a)(2), which unlawfully categorically asserts jurisdiction over all interstate waters, regardless of navigability.

Please contact Jen Verleger or Maggie Olson in my office if you have any questions.

Sincerely,

s/ Wayne Stenehjem
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 3:15-cv-00059-DLH-ARS
	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
	)	
	)	
Defendants.		

PLAINTIFF STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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JURISDICTIONAL STATEMENT

Plaintiffs, States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and New Mexico State Engineer (the "Plaintiff States") submit jurisdiction is proper under 5 U.S.C. § 706, 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, and the Supreme Court's ruling in *Nat'l Ass'n of Mfrs. v. Dep't of Defense,* 138 S. Ct. 617 (2018).

Venue is proper under 28 U.S.C. § 1391(e) because the State of North Dakota resides in this judicial district.

INTRODUCTION

This case is about who—the federal government or the sovereign Plaintiff States—has authority to regulate land and water features that have no significant nexus to, and in most cases are distant or isolated from, any "navigable waters," and thus are not "waters of the United States" over which the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, Agencies) have jurisdiction under the Clean Water Act (CWA). The CWA text, Supreme Court precedent interpreting the CWA, and the U.S. Constitution reserve that authority to the States.

The final regulation entitled "Clean Water Rule: Definition of 'Waters of the United States'" (the WOTUS Rule) was promulgated by the Agencies under their statutorily delegated authority under the CWA. 80 Fed. Reg. 37054 (June 29, 2015). In the CWA, Congress explicitly chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Congress balanced States' sovereign authority over their land and water by granting the federal government primary jurisdiction only over "navigable waters," defined as "the waters of the

United States, including the territorial seas." 33 U.S.C. § 1362(7).[1] The definition of navigable waters is the critical inquiry here, as it denotes where the Agencies' limited jurisdiction ends.

The Supreme Court has already identified the inherent jurisdictional limits in "navigable waters," noting that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*); *Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring) (a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance"). Congress's choice of "navigable" reflects the Constitutional limit on Congress's ability to regulate waters under the Commerce Clause and the limitations of the Tenth Amendment on federal power. *See SWANCC*, 531 U.S. at 173 (rejecting the Corps' interpretation of the CWA, in part, for implicating "significant constitutional questions" including Commerce Clause concerns).

In *SWANCC*, the Court invalidated a Corps rule asserting jurisdiction over isolated, intrastate ponds because the ponds were used by migratory birds. In *Rapanos*, the Court held that the Corps could not regulate wetlands far removed from navigable-in-fact waters, including those wetlands adjacent to ditches and drains that the Corps deemed tributaries of navigable waters. In both *SWANCC* and *Rapanos*, the Court made it clear that to preserve the federal-state balance required by both the CWA and the Constitution, the term "waters of the United States"

[1] This memorandum refers to "navigable water(s)" throughout to point to those waters traditionally under the Agencies' CWA jurisdiction and defined by prior codifications at 33 C.F.R. § 328.3(a)(1)-(3). This term is not an endorsement of the Agencies' statutory authority over these waters (interstate waters), but a reference point for discussing the WOTUS Rule's expansion of the definition of navigable waters, through the definition of "waters of the United States" in 33 C.F.R. § 328.3(a).

("WOTUS") must be given a meaning that is consistent with the term it defines—"navigable waters." Waters with a "speculative or insubstantial" relation to navigable waters "fall outside the zone fairly encompassed by the term 'navigable waters.'" *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring); *Id.* at 731 (Scalia, J., Plurality) ("qualifier 'navigable' is not devoid of significance"); *SWANCC,* 531 U.S. 172 ("We cannot agree that Congress's separate definitional use of the phrase '[WOTUS]' constitutes a basis for reading the term 'navigable waters' out of the statute.").

Nonetheless, the Agencies ignored the holdings of *SWANCC* and *Rapanos* in adopting the WOTUS Rule. When it granted the Plaintiff States' request for a preliminary injunction in 2015, this Court explicitly found that the WOTUS Rule was inconsistent with Justice Kennedy's concurrence in Rapanos. *See*, Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction, ECF No. 70 (Aug. 27, 2015) at p.11 (hereinafter "PI Order"). The WOTUS Rule not only asserts jurisdiction over the *very same* waters that the Supreme Court heldwere outside the Agencies' authority, but also asserts jurisdiction over stream beds that usually carry no water and other lands that are rarely connected to navigable-in-fact waters, if at all, only once a century. Effectively removing the "navigable" jurisdictional boundary, the Agencies claim their CWA authority reaches beyond "traditional navigable waters" to all "interstate waters." 80 Fed. Reg. at 37055. The WOTUS Rule reaches dry arroyos in New Mexico, ephemeral drainages in Wyoming, isolated Prairie Potholes on the North Dakota plains, and thousands of square miles of Alaskan land that is frozen most of the year. This case is about more than water; the Agencies seek to exercise jurisdiction over vast areas of largely dry land with no rational connection to "navigable waters." The WOTUS Rule destroys the careful balance between federal and state authority that Congress struck in the CWA, exceeds

Congress's delegable authority under the Commerce Clause, and violates the Plaintiff States' rights under the Tenth Amendment to the United States Constitution.

The WOTUS Rule is also a textbook example of procedural failures. The Agencies refused to engage properly with the public in the development of the WOTUS Rule and finalized a rule that is alien to the proposed rule. After the close of the public comment period, the Agencies made material changes in the WOTUS Rule that were not a logical outgrowth of the proposed rule and that the Plaintiff States should have had opportunity to comment on. The WOTUS Rule was also based on technical analyses unavailable to Plaintiff States during the notice-and-comment period, including what the Agencies called a "Science Report,"[2] the final version of which was published two months after the close of the public comment period.[3] Further, despite the admittedly broad impact of the WOTUS Rule, the Corps determined the WOTUS Rule would not have significant environmental or socioeconomic implications, ignoring its obligations under the National Environmental Policy Act ("NEPA").

When this Court preliminarily enjoined the WOTUS Rule in 2015, it found that the Plaintiff States had a substantial likelihood of success on the merits on a number of grounds,

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[2] "Science Report," is the Agencies name in the rulemaking for a *draft* study examining the connectivity of upstream and downstream waters (referred to in this memorandum as the "Draft Connectivity Study").

[3] The U.S. House of Representatives Committee on Oversight and Government Reform produced a 180-page report on the deficiencies with the Agencies' rulemaking process. HOUSE COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., MAJ., STAFF REP. ON POLITICIZATION OF THE WATERS OF THE UNITED STATES RULEMAKING (Comm. Print 2016) (available at https://oversight.house.gov/wp-content/uploads/2016/10/WOTUS-OGR-Report-final-for-release-1814-Logo-1.pdf) ("HCOGR Report") (attached as Exhibit 1). The HCOGR Report found that (1) the Agencies used an accelerated timeline that appeared to be motivated by political considerations; (2) the Corps was cut out of the rule development process; (3) the WOTUS Rule was not based on sound science; (4) the Agencies did not consider alternatives; (5) the Agencies went to unusual lengths to avoid completing an Environmental Impact Statement ("EIS"); (6) the Agencies violated the Regulatory Flexibility Act; (7) public comments were not fully reviewed; and (8) the Agencies failed to consult fully with States, local governments, and tribes. Id. at p. 10.

including that it was likely that EPA had exceeded the authority granted to it by Congress and that it had violated the APA. *See*, PI Order, ECF No. 70. The Plaintiff States believe that they should prevail on these, and other, grounds that the WOTUS Rule should now be permanently enjoined and set aside.

STANDARD OF REVIEW

A court reviewing an informal rulemaking "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The court also "shall review the whole record or those parts of it cited by a party" and in doing so must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;" found to be "contrary to constitutional right, power, privilege, or immunity;" in "excess of statutory jurisdiction;" not in accordance with "procedure required by law;" unsupported by "substantial evidence;" or "unwarranted by the facts." *Id.* When a court reviews an agency's construction of a statute it administers, if the text is clear, the court must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). An agency's interpretation contrary to the clear statutory text is not entitled to deference. *Id.*

STATEMENT OF UNCONTESTED MATERIAL FACTS

Plaintiff States and Defendants stipulated to a revised certified index of the Administrative Record (Dkt. Nos. 190, 195), maintained at www.regulations.gov under docket number EPA-HQ-OW-2011-0880. Plaintiff States rely on that record as support for their Motion for Summary Judgment ("Motion"). The following uncontested material facts are significant.

A. Statutory and Regulatory Background

The CWA provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The Agencies' CWA jurisdiction is limited: Congress granted the Agencies authority only over "navigable waters," *see, e.g.*, 33 U.S.C. § 1362(12), defining such waters as "[WOTUS], including the territorial seas." *Id.* § 1362(7).

The definition of navigable waters determines the scope of many provisions in the CWA, including obligations imposed upon the Plaintiff States. Subject to some exclusions, the CWA requires any person who discharges pollutants into navigable waters to obtain a permit under the National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, or under section 404 of the CWA for the discharge of dredged or fill material, *id.* § 1344. Section 404 permitting has particular importance to the use and development of land because the Corps will typically require a permit for digging or filling activities on land features found to be navigable waters, even if those land features rarely contain any water. Forty-six States have assumed NPDES permitting responsibilities under 33 U.S.C. § 1342(b); another two have assumed section 404 permitting under § 1344(g). States are responsible for developing water quality standards for those navigable waters that lie within their borders, including regular reporting to EPA, implementing plans to achieve those standards in navigable waters, and taking those standards into account in permitting decisions. *Id*. §§ 1313, 1315 and 1341. The CWA authority of the Agencies and the resulting obligations of Plaintiff States are thus bound to the scope of federal jurisdiction established by the term "navigable waters."

Waters that are not navigable are not subject to federal CWA jurisdiction, and the Plaintiff States regulate the water quality and use of such waters under their independent sovereign authority. *See, e.g.,* N.D. Cent. Code Ch. 61-28; Mont. Code Ann. §§ 75-5-101 *et*

seq.; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*, and; Ark. Code Ann. § 8-4-101 *et seq.*

B. The Proposed Rule

On April 21, 2014, the Agencies published a proposed rule redefining "waters of the United States," and thus navigable waters under the CWA. Definition of ''Waters of the United States'' Under the Clean Water Act, 79 Fed. Reg. 22188 (Apr. 21, 2014) ("Proposed Rule"). The Agencies proposed to categorize WOTUS under the CWA as "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," as well as "[a]ll interstate waters, including interstate wetlands" and "the territorial seas." *Id.* at 22268–69. The Proposed Rule then proposed three additional categories of waters that would fall within the definition of navigable: (1) all "tributaries" of navigable waters would be *per se* jurisdictional; (2) all waters "adjacent" to navigable waters would be *per se* jurisdictional," and (3) additional waters, on a case-by-case basis, that "alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" navigable water. *Id.* at 22269. One of the key technical documents relied on by the Agencies in the proposal was a September 2013 draft report called *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Draft Connectivity Study"). ID-0004.[4]

The Proposed Rule drew more than one million comments, including comments from virtually every State. A prevailing theme in the States' comments was that the Proposed Rule would regulate many local water and land features that did not have a significant nexus to navigable waters and thus exceeded the Agencies' limited CWA jurisdiction. *See, e.g.*, ND

[4] Citations to record materials within this memorandum are as follows: short title, a pinpoint page reference if applicable, and an abbreviated EPA docket number (such as ID-0004 in long form is EPA-HQ-OW-2011-0880-0004).

Comments 14-15, ID-15365; Multi-State Comments 2, ID-7988; WY DEQ Comments 3, ID-18020; AK DEC Comments 27, ID-19465. Plaintiff States also commented that EPA's Draft Connectivity Study failed to address adequately the significance of the connection between various waters. *See, e.g.*, AK DEC Comments 11-12, ID-19465; ND Comments 5-6, ID-15365; Draft Connectivity Study, ID-0004. Plaintiff States also protested that only a Draft Connectivity Study was available during the comment period. *See* AK DEC Comments 11, ID-19465. Commenters also called for the Agencies to comply with NEPA by preparing an EIS assessing the environmental and socioeconomic effects of the Proposed Rule. *See* AK DEC Comments 15-16, ID-19465.

C. The WOTUS Rule

The Agencies published the final WOTUS Rule on June 29, 2015. 80 Fed. Reg. 37054. The WOTUS Rule largely retains the proposal's sweeping approach to "tributaries," but promulgates a much different approach to "adjacent" waters and "case-by-case" waters that is unsupported by the record and is not a logical outgrowth of the Proposed Rule. Several of the central arguments made by the Agencies to support the final WOTUS Rule were not mentioned in the Proposed Rule or analyzed in the administrative record. The WOTUS Rule also relied on a final and significantly revised version of the Draft Connectivity Study published two months *after* the close of the comment period. *See* Connectivity Of Streams And Wetlands To Downstream Waters: A Review And Synthesis Of The Scientific Evidence, ID-20859; 80 Fed. Reg. 2100 (Jan. 15, 2015) ("Final Connectivity Study").

The Agencies also ignored comments requesting that an EIS be prepared in compliance with NEPA and instead prepared a more limited Environmental Assessment ("EA")[5] and

[5] Final EA, ID-20867.

corresponding Finding of No Significant Impact ("FONSI"),[6] determining that the WOTUS Rule fell below the significance threshold triggering the need for full evaluation in an EIS..[7] Since the Final EA was published six months *after* the close of the public comment period and barely a month before publication of the WOTUS Rule, the Plaintiff States were effectively precluded from participating in the NEPA process.

In general, the WOTUS Rule includes three newly defined categories of navigable waters that Plaintiff States' challenge here:

Tributaries. The WOTUS Rule claims *per se* federal jurisdiction over "[a]ll tributaries," 33 C.F.R. § 328.3(a)(5),[8] defined as any "water that contributes flow, either directly or through another water" to a navigable water and that is "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark," *id.* § 328.3(c)(3). A tributary may be "perennial, intermittent, or ephemeral" as long as it eventually contributes flow through "any number of downstream waters." 80 Fed. Reg. at 37076. The downstream waters can include "non-jurisdictional features" (such as excluded ditches and wetlands) as long as the intermittent or ephemeral flows, at some point, connect to a "tributary system that *eventually* flows to a traditional navigable water." *Id.* (emphasis added). The presence of indicators of bed

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[6] FONSI, ID-20867.

[7] The EPA also ignored the Corps' own comments, submitted a month before the Final EA was issued, suggesting that that an EIS was appropriate. Moyer Memorandum 1, ID-20882 ("To remove from CWA jurisdiction . . . aquatic resources . . . without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment.").

[8] The WOTUS Rule's definitions of WOTUS are in several parts of the Code of Federal Regulations beginning on 80 Fed. Reg. at 37104. For ease of reference, this memorandum refers to the Code of Federal Regulations codification to pinpoint cite specific subparts of the WOTUS Rule, and uses Federal Register page number for citations to the preamble. Unless otherwise noted, all Code of Federal Regulations citations are to the WOTUS Rule codification.

and banks and an ordinary high water mark ("OHWM") also need not be continuous, so long as those indicators "can be identified upstream of the break." 33 C.F.R. § 328.3(c)(3).

Adjacent Waters. The WOTUS Rule asserts *per se* federal jurisdiction over all waters "adjacent" to navigable waters and their "tributaries." 33 C.F.R. § 328.3(a)(6). The WOTUS Rule defines "adjacent" as all waters "bordering, contiguous, or neighboring" navigable waters, impoundments, or tributaries. *Id.* § 328.3(c)(1). This definition includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* Departing significantly from the Proposed Rule, the WOTUS Rule then defines "neighboring" to cover: (1) "all waters" any part of which are within 100 feet of the OHWM of a navigable water or "tributary;" (2) "all waters" any part of which are within 1,500 feet of the OHWM of a navigable water or "tributary" and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high tide line of a navigable water. *Id*. § 328.3(c)(2). None of these three distance-based criteria, as they relate to adjacent waters, were in the Proposed Rule.

The WOTUS Rule also adds an exclusion from the adjacent waters categories—also not mentioned in the Proposed Rule—for "[adjacent w]aters being used for established normal farming, ranching, and silviculture activities," but a similar exclusion is not provided for *per se* jurisdictional tributaries. *Id*. § 328.3(c)(1).

Case-by-Case Waters. The WOTUS Rule allows the Agencies to exercise federal jurisdiction on a case-by-case basis over waters and land features in a way that differs significantly from the Proposed Rule. The Agencies assert jurisdiction over those "waters [at least partially] located within the 100-year floodplain of a" navigable water and "waters [at least partially] located within 4,000 feet of the high tide line or [OHWM] mark of a" navigable water, impoundment, or tributary, so long as the Agencies find a "significant nexus" with a navigable

water. 33 C.F.R. § 328.3(a)(8). Neither of these distance-based criteria for case-by-case waters were discussed in the Proposed Rule.

Water will be found to have a "significant nexus" to a navigable water if that water, "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a [navigable water]" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5). For example, if bird species (e.*g.,* ducks) use a hydrologically isolated pond for occasional foraging as part of their life cycle, and during other parts of their life cycle resides in navigable-in-fact waters, that use would extend federal jurisdiction to the isolated pond. *See* 80 Fed. Reg. at 37093 ("a species is located in a [navigable water] if such a water is a typical type of habitat for *at least part* of the life cycle" (emphasis added)). Isolated wetlands or depressions could be found jurisdictional precisely *because of* their isolation—if the Agencies determine that such features store water, trap and filter sediments or pollution, or cycle nutrients, they can be considered jurisdictional because of the trapping or filtering "function" they perform. *See id*. ("the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water").

Interstate Waters. The Agencies have also re-codified a longstanding violation of the CWA and the Constitution by including all interstate waters, regardless of navigability or connection to a navigable water, as jurisdictional.

ARGUMENT

The WOTUS Rule violates the Agencies' statutory grant of authority under the CWA, the United States Constitution, and the procedural and substantive provisions of the Administrative Procedure Act ("APA") and NEPA. Given the pervasive deficiencies in the WOTUS Rule, as

also discussed by this Court when it issued the preliminary injunction, no part of the WOTUS Rule can survive on its own, and the WOTUS Rule should be permanently enjoined and set aside by the Court in its entirety.

I. THE WOTUS RULE VIOLATES THE CLEAN WATER ACT

The Agencies' interpretation and application of the term "waters of the United States," and thus "navigable waters" in the WOTUS Rule violates the CWA, both textually and under applicable Supreme Court jurisprudence.

A. The WOTUS Rule Is Inconsistent With The Language Of The CWA

The WOTUS Rule violates the CWA because the Agencies' definition of the term WOTUS is not "consistent with the language of the statute." *K Mart Corp. v. Cartier,* 486 U.S. 281, 291 (1988). The WOTUS Rule is inconsistent with "the plain meaning of the [CWA]" when viewing the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.* This is true "in light of the language, policies, and legislative history" of the CWA. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131 (1985). This Court observed that "it is likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue." *See*, PI Order, ECF No. 70 at p.2.

Starting with the plain language of the statute, the WOTUS Rule's expansive jurisdictional reach cannot be squared with the ordinary meaning of "navigable waters.". 33 U.S.C. § 1362(7). There can be no meaningful discussion of "waters of the United States" outside the statutory term it is intended to define: "navigable waters." *Id.* Yet the Agencies assert CWA jurisdiction over water bodies with no or little connection with navigable waters. For example, they assert CWA jurisdiction over dry channels that provide "intermittent or ephemeral" flow through "any number of downstream waters" as long as they connect to a "tributary system that eventually flows to a traditional navigable water." 80 Fed. Reg. at 37076.

Prairie Potholes are captured by the WOTUS Rule precisely because they "lack a surface hydrologic connection" to navigable waters. *Id.* at 37093. But the plain language of the CWA does not permit the Agencies to sweep isolated waters and land features into their jurisdiction that have no or at best only a remote relationship to navigable-in-fact waters. It is a "central requirement" of the CWA that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). Adopting the WOTUS Rule's expansive jurisdictional overreach would effectively read the term "navigable" out of the CWA so that WOTUS would be defining "waters," not "navigable waters."

The WOTUS Rule also effectively eliminates Congress's express directive that the CWA must "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources." 33 U.S.C. § 1251(b). By the EPA's own admission, the WOTUS Rule covers "the vast majority of the nation's water features." Economic Analysis 11, ID-20866. By impermissibly expanding the scope of the WOTUS Rule to virtually all waters traditionally under State control, the Agencies have violated the state-federal balance Congress enshrined in the CWA.

B. The WOTUS Rule Violates Longstanding Supreme Court Precedent Interpreting The CWA

In rejecting earlier efforts by the Corps to over step its jurisdictional boundaries, the Supreme Court has already spoken to what constitutes a "reasonable interpretation of 'navigable waters.'" *Rapanos,* 547 U.S. at 767 (Kennedy, J., concurring). Before the CWA was enacted, WOTUS were limited to "waters that are 'navigable in fact' or readily susceptible of being rendered so." *Id.* at 723 (Scalia, J., plurality). After passage of the CWA, the Agencies first relied on this traditional definition of WOTUS until adopting broader definitions in 1975 and

1977. *Id. (*Scalia, J., plurality) (referencing 40 Fed. Reg. 31324–31325 (1975); 42 Fed. Reg. 37144 (1977)). *Id.* at 724.

In *Riverside Bayview*, the Supreme Court first reviewed the Agencies' broadened definitions in the context of determining whether the Corps could "exercise jurisdiction over wetlands adjacent" to conventional navigable waters. 474 U.S. at 131. The Court found the Corps' jurisdiction could extend to adjacent wetlands, noting Congressional intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. Key to the Court's holding was that it could not say the Corps' determination that "adjacent wetlands are *inseparably bound up* with the [WOTUS] . . . [wa]s unreasonable." *Id.* at 134 (emphasis added).

Sixteen years later, the Supreme Court held that CWA jurisdiction was not appropriate over "nonnavigable, isolated, intrastate waters" such as seasonal ponds, "*not* adjacent to open water." *SWANCC*, 531 U.S. at 169, 168. The Court found the CWA "to be clear" in prohibiting jurisdiction over isolated intrastate waters, and refused to defer to the Corps' jurisdictional interpretation under *Chevron*. *Id.* at 172[9] To hold that navigable waters included isolated intrastate ponds would "assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" *Id.* at 171-172.

In *Rapanos*, the Court again rejected the Corps' assertion of authority over intrastate wetlands located "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." 547 U.S. at 729 (Scalia, J., plurality). The plurality concluded that the "only plausible interpretation . . . [of] 'the [WOTUS]' includes only those relatively permanent,

[9] The Court went on to explain that *even if the text were unclear*, thus entitling the Corps to *Chevron* deference, this deference was inappropriate to avoid "significant constitutional and federalism questions." *Id.* at 174. The same constitutional concerns are relevant to the WOTUS Rule and are discussed below in section II of the Argument.

standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]. . . oceans, rivers, [and] lakes,'" and "wetlands with a continuous surface connection to" those waters. *Id*. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)). The plurality explained that "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" are outside CWA jurisdiction. *Id.*

Justice Kennedy's stated that the Agencies have authority only over waters that are navigable-in-fact and waters with a "significant nexus" to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring). A water has a "significant nexus" if it "significantly affect[s] the chemical, physical, and biological integrity" of a navigable water. *Id.* at 780. Justice Kennedy rejected CWA jurisdiction over all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776; *see also id.* at 769 ("merest trickle, [even] if continuous" is insufficient). Justice Kennedy also rejected the Corps' "theory of jurisdiction," based on any "adjacency to tributaries, however remote and insubstantial." *Id.* at 780.

Rapanos and *SWANCC* were decided under the Agencies' prior codification defining WOTUS in a far less expansive than what the Agencies assert in the WOTUS Rule. *SWANCC* specifically noted that it could not hold that "the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." 531 U.S. at 168. The plurality in *Rapanos* noted, "because *SWANCC* did not directly address tributaries, the Corps . . . continue[d] to assert jurisdiction over waters 'neighboring' traditional navigable waters and their tributaries" in the time between *SWANCC* and *Rapanos.* 547 U.S. at 726 (Scalia, J., plurality). The plurality objected to the "Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'." *Id.* Rejecting the Corps' approach, the plurality held that wetlands were adjacent, and thus

jurisdictional, only when they shared a "continuous surface connection to bodies that are '[WOTUS]' . . . so that there is no clear demarcation between 'waters' and wetlands." *Id.* at 742.

Justice Kennedy's concurrence stated that the Corps' attempt to tie adjacency to tributary (as opposed to navigable) waters was too broad a jurisdictional hook. 547 U.S. at 781-782. Both the plurality and the concurrence in *Rapanos* rejected the Corps' definitions of adjacency contained within the pre-WOTUS Rule version of 33 C.F.R. § 328.3(a)(7) (effective to August 27, 2015). Thus, the Supreme Court rejected a theory that would allow federal CWA jurisdiction to be asserted over a distant or remote water body based on a series of limited connections among non-jurisdictional water bodies that might ultimately lead to an even more attenuated connection to a navigable-in-fact water body; precisely what the Agencies are trying to do in the WOTUS Rule.

The Agencies now seek to expand their jurisdiction and ignore *Rapanos* by unlawfully reworking the definitions of "adjacent," "neighboring," and "tributary" waters in the WOTUS Rule.[10] The Agencies have also re-codified a violation of the CWA and the Constitution by including all interstate waters, regardless of navigability or connectivity to a navigable water, as jurisdictional. This Court found that the WOTUS Rule suffered from the same "fatal defect" as did the Corps' rule rejected in *Rapanos*, observing that the WOTUS Rule allows EPA to regulate waters that "do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable water." *See*, PI Order, ECF No. 70 at p.11. In addition, for reasons discussed in more detail below, and consistent with the Supreme Court's determination in *SWANCC*, 531

[10] The 8th Circuit Court of Appeals has held that the Agencies may assert CWA jurisdiction under either the plurality or the concurrence in *Rapanos*. *See United States v. Bailey,* 571 F.3d 791, 799 (8th Cir. 2009). Which opinion in *Rapanos* is applied is unimportant at this stage, as the WOTUS Rule fails under either the plurality or concurring opinion.

U.S. at 172, the Agencies' interpretation of the term "navigable waters" is not due any deference under *Chevron.* 467 U.S. 837 (1984).[11]

i. The WOTUS Rule Violates *Rapanos* And The CWA In *Per Se* Coverage Of Tributary Waters

The WOTUS Rule's provision that all "tributaries" of navigable waters are *per se* WOTUS cannot be squared with the statute or *Rapanos*. Since the WOTUS Rule defines "waters of the United States" to include any "interstate waters," that means any "tributaries," however defined, to non-navigable interstate waters are subject to CWA jurisdiction, with no connection of any kind, much less a significant one, to navigable waters.

Under the WOTUS Rule, a tributary is any land feature with "a bed and banks and an [OHWM]" and that "contributes flow"—no matter how small or ephemeral—"either directly or through another water" to a navigable water. 33 C.F.R. § 328.3(c)(3). As a result, tributaries under the WOTUS Rule include typically dry land features that indirectly and only sometimes contribute even a mere trickle that might eventually reach a navigable water, even if the flow is "intermittent" or "ephemeral" and "only in response to precipitation events." 80 Fed. Reg. at 37076. The presence of such "tributaries" may even be "infer[red]" through "desktop tools" where not apparent through "direct field observation." *Id.* at 37077.

Thisdefinition fails the plurality's test in *Rapanos*, which found it unreasonable to read WOTUS to include "channels containing merely intermittent or ephemeral flow." *Rapanos,* 547 U.S. at 733 (Scalia, J., plurality). It also fails Justice Kennedy's test because it provides no "assurance" that jurisdictional waters have a *significant* nexus to a navigable water. *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring). This Court noted that "this is precisely the

[11] In addition, for reasons discussed in more detail below, and consistent with the Supreme Court's determination in SWANCC, 531 U.S. at 172, the Agencies' interpretation of the term "navigable waters" is not due any deference under Chevron. 467 U.S. 837 (1984).

concern Justice Kennedy had in *Rapanos*, and indeed the general definition of 'tributary' is strikingly similar," concluding that the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term." *See*, PI Order, ECF No. 70 at p.11.

Justice Kennedy wrote that "volume and regularity" of flow are relevant to decide whether a feature plays a sufficient role in "the integrity of an aquatic system" to establish a significant nexus to a navigable-in-fact water, and expressly rejected federal jurisdiction over features with "[t]he merest trickle [even] if continuous.". *Rapanos*, 547 U.S. at 769 and 781 (Kennedy, J., concurring). The WOTUS Rule's OHWM criterion does not satisfy Justice Kennedy's test. The WOTUS Rule defines an OHWM as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(c)(6). This definition is largely a descriptor of a land feature, not a descriptor of water or flow, much less "navigable waters." Justice Kennedy rejected reliance on the OHWM as a "determinative measure" for establishing a significant nexus, noting "the breadth of this standard . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." 547 U.S. at 761, 781 (Kennedy, J., concurring). Such a standard would sweep in waters "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781–82.

The Agencies' own studies show that the inadequacy of an OHWM as a criterion A 2006 Corps study found "no direct correlation between the location of OHWM indicators and . . .

inundation areas" in the arid southwest.[12] OHWM indicators are "frequently the result of moderate to extreme flood events," and "are not associated with any return interval event or with physical channel features found in the field." *Id.* A 2013 Corps study concluded that "OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics."[13] The Rawhide Wash in Scottsdale, Arizona provides a compelling example of why these studies are accurate. The Wash conveyed water flow only 12 times over a 15-year period, *for a total of 18 hours during that entire time*. City of Scottsdale Comments 3, ID-18024. Like most washes, the flow is highly episodic and infiltrates the permeable soils long before it reaches a navigable-in-fact water; therefore even those 18 hours of "flow" in a 15-year period cannot be characterized as connected to waters that are navigable-in-fact. *Id.* Under the WOTUS Rule, similar dry washes throughout the arid southwest would be subject to automatic federal jurisdiction, transforming the Clean *Water* Act into the Clean *Land and Water* Act.

The "bed and banks" requirement is an even less reliable measure of water flow. For example, "erosional channels or cuts often will appear to have a distinguishable bed and banks . . . but [those] are not evidence that the channels actually contribute flow to [navigable waters]." AMA Comments 9, ID-13951; *see also* WAC Comments 34, ID-14568 ("Bed, banks, and OHWM can be seen even in features without ordinary flow."). Particularly in the arid west,

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[12] Lichvar, Robert et al., U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* 14 (2006), https://erdc-library.erdc.dren.mil/xmlui/bitstream/handle/11681/5327/CRREL-TR-06-5.pdf?sequence=1&isAllowed=y, as cited in AMA Comments 10-11, ID-13951.

[13] Lefebvre, Lindsey et al., U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), https://erdc-library.erdc.dren.mil/xmlui/bitstream/handle/11681/5496/ERDC-CRREL-TR-13-2.pdf?sequence=1&isAllowed=y, as cited in AMA Comments 11, ID-13951.

channels with a bed and banks need not convey even a minimal amount of water. *See* Freeport Comments 2, ID-14135; City of Scottsdale Comments 3–5, ID-18024. The bed and banks requirement thus provides no assurance that a water "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

The Agencies seek to fend off challenges to the OHWM and bed and bank criteria by codifying the statement that "[t]hese physical indicators demonstrate there is volume, frequency, and duration of flow sufficient" to qualify tributary waters as jurisdictional. 33 C.F.R. § 328.3(c)(3). This conclusory, unsupported statement is cherry-picked from language in Justice Kennedy's concurrence, does not reflect the lack of volume, frequency and flow criteria, and is not based on any evidence in the record. The evidence in the record (of which the comments of Scottsdale and Freeport discussed above are just examples) proves that one cannot extrapolate volumes of flow or proximity to navigable waters simply with reference to physical features such as debris or a discernable OHWM. To the contrary, the record shows even the most ephemeral flows with no connection to navigable waters can generate these land features, and the record does not support the Agencies' conclusion that the presence of such dry land features creates *per se* CWA jurisdiction.

The WOTUS Rule also covers "[d]itches with perennial flow, [d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, [and] [d]itches, *regardless of flow*, that are excavated in or relocate a tributary" that fall outside the permissible scope of the CWA. 80 Fed. Reg. at 37078 (emphasis added). These are the "drains, ditches and streams" carrying only minor water volumes that Justice Kennedy rejected in *Rapanos*. 547 U.S. at 781 (Kennedy, J., concurring).

ii. The WOTUS Rule Violates *Rapanos* And The CWA In *Per Se* Coverage Of Adjacent Waters

Because the WOTUS Rule's *per se* coverage of "tributaries" is unlawful, any assertion of jurisdiction over "adjacent waters" is illegal to the extent that it relies on a connection with an unlawfully defined "tributary."

The WOTUS Rule's *per se* coverage of all "adjacent" waters is also irreconcilable with *Rapanos*. The WOTUS Rule defines adjacent waters as, among other things, (1) "all waters [at least partially] located within 100 feet of the [OHWM] of a" navigable water, impoundment, or tributary; (2) all "waters located within the 100-year floodplain of a" navigable water, impoundment, or tributary "and not more than 1,500 feet from the [OHWM] of such water;" and (3) "all waters [at least partially] located within 1,500 feet of the high tide line of a" navigable water. *Id*. § 328.3(c)(2).

The plurality in *Rapanos* requires a "continuous surface connection" for adjacent waters to be jurisdictional, which ephemeral or intermittent tributaries do not maintain nor do arbitrary distance-based criteria establish. 547 U.S. at 757 (Scalia, J., plurality). The concurrence also rejected the notion that waters adjacent to a tributary are *per se* jurisdictional absent some additional significant nexus, stating "[i]ndeed, in many cases wetlands adjacent to tributaries . . . might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781-782 (Kennedy, J., concurring). The Agencies double down on their unlawful assertion of authority by defining adjacency far more broadly than the prior rule rejected in *Rapanos*.

"Neighboring," is defined with novel distance-based criteria that effectively cause "adjacent" to read as "within 1,500 feet from the [OHWM]" of an ephemeral tributary. 33 C.F.R. 328.3(c)(2)(ii). Waters are *per se* jurisdictional solely by distance-based proximity to

non-navigable tributaries. The *Rapanos* plurality rejected federal jurisdiction based on adjacency to "ordinarily dry channels through which water occasionally or intermittently flows." 547 U.S. at 733 (Scalia, J., plurality). Justice Kennedy's concurrence also rejected federal jurisdiction solely based on adjacency to non-navigable tributaries because of the potential for overreach, requiring a separate significant nexus to be established "on a case-by-case basis." Id. at 782 (Kennedy, J., concurring).

The WOTUS Rule's distance-based approach is invalid under *Rapanos* even when not dealing with tributaries, extending CWA jurisdiction to small ponds, drainages, and wetlands simply because they might have a relationship with this water during a once-in-a-century storm. *See* 33 C.F.R. 328.3(c)(2)(ii) (linking jurisdiction to the 100-year floodplain). This falls far short of the plurality's *continuous* surface connection requirement, and violates the concurrence's approach, which requires "assurance" that a water "significantly affect[s]" the "chemical, physical, and biological integrity" of "navigable waters in the traditional sense." 547 U.S. at 779–80 (Kennedy, J., concurring). As Justice Kennedy explained, "[a] mere hydrologic connection should not suffice in all cases," because it "may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784–85. A potential once-in-a-hundred-years hydrologic connection is surely too insubstantial given its infrequency, and would effectively extend the Agencies' CWA jurisdiction to a vast amount of land based on 100-year flood plain maps.

The WOTUS Rule's categorical claim of federal jurisdiction over all "adjacent" waters as far as 1,500 feet from a "tributary" is far more expansive than the rule rejected in *Rapanos* as "precluded" by the CWA. *See* 547 U.S. at 748-49 (Scalia, J., plurality) ("[i]t is not clear why roughly defined physical proximity should make such a difference—without actual abutment, it

raises no boundary-drawing ambiguity, and it is undoubtedly a poor proxy for ecological significance"); *see also id.* at 778-79 (Kennedy, J., concurring) (Corps cannot regulate simply "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."). The WOTUS Rule goes beyond what was rejected by Justice Kennedy because it would exercise jurisdiction over wetlands, ditches, or drains even without any evidence of any eventual flow into traditional navigable waters. The WOTUS Rule's labeling these waters as "adjacent" also fails under *SWANCC*, which both the plurality and concurrence relied on in *Rapanos.*[14]

The WOTUS Rule's other two distance-based adjacency categories—"all waters [at least partially] located within 100 feet of the [OHWM] of a" navigable water, impoundment, or tributary, and "all waters [at least partially] located within 1,500 feet of the high tide line of a" navigable water—are similarly unlawful. 33 C.F.R. § 328.3(c)(2). Even the EPA's Science Advisory Board noted that "'the available science supports defining adjacency or determination of adjacency on the basis of *functional relationships*,' rather than 'solely on the basis of *geographical proximity of distance* to jurisdictional waters.'" 80 Fed. Reg. at 37064 (citation omitted) (emphasis added). Yet the Agencies based their definitions of adjacent waters "solely" on "geographical proximity." These arbitrary distance-based criteria provide no assurance that the covered land features "play an important role in the integrity of . . . navigable waters." *Rapanos*, 547 U.S. at 781–82 (Kennedy, J., concurring).

[14] After noting that Riverside Bayview had upheld federal jurisdiction "over wetlands that actually abutted on a navigable waterway," the Court in SWANCC rejected jurisdiction over "ponds that are not adjacent to open water." 531 U.S. at 167, 168; see Sackett v. EPA, 566 U.S. 120, 123-24 (2012) (contrasting abutting waters in Riverside Bayview with non-adjacent waters in SWANCC and Rapanos).

iii. The WOTUS Rule Violates *Rapanos* And The CWA In Case-By-Case Determinations For Other Waters

The WOTUS Rule's approach to case-by-case jurisdictional waters is also inconsistent with *Rapanos*. The Agencies assert jurisdiction over all waters (and thus associated land features) determined to have a "significant nexus to a" navigable water, provided that the waters are (1) "located within the 100-year floodplain" of a navigable water; or (2) "located within 4,000 feet of the high tide line or [OHWM]" of a navigable water, impoundment or tributary. 33 C.F.R. § 328.3(a)(8). Based on the "functions performed by the water," a "significant nexus" exists if the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a [navigable water]." 33 C.F.R. § 328.3(c)(5). The functions include, among others, "contribution of flow," "export of organic matter," "export of food resources," and "provision of life cycle dependent aquatic habitat" for "species located in" navigable waters. *Id.*

The "functions" list violates the plurality holding in *Rapanos*, as a usually dry channel could meet the Agencies' criterion for "[c]ontribution of flow," 33 C.F.R. § 328.3(c)(5), during a rare rainstorm and yet lack "a continuous surface connection" with the navigable waters called for in *Rapanos*. 547 U.S. at 717. Similarly, an isolated body of water that is episodically used by some wildlife might affect the "[p]rovision of life cycle dependent aquatic habitat . . . for species located in a [navigable] water," 33 C.F.R. § 328.3(c)(5), and yet lack a "continuous surface connection" with the navigable water (the "connection" of a bird flying 10 miles from an isolated body of water to a navigable river can, by itself, transform the isolated body of water with no hydrological connections of any kind to any other waters into a "navigable water"). The Supreme Court already rejected such an expansive definition in *SWANCC*, invalidating a rule asserting jurisdiction over isolated, local ponds because the ponds were used by migratory birds.

Going beyond the language of the CWA and Supreme Court precedent, the Agencies claim jurisdiction over land features and water bodies precisely because they have no connection at all with any navigable waters under the remarkable theory that, for example, a collection of unconnected and typically dry Prairie Potholes collect water that might, without these Prairie Potholes, potentially find its way to navigable waters. *See* 80 Fed. Ref. at 37071. This turns the CWA upside down, as jurisdiction is now based on the *lack* of any hydrologic connection with navigable waters.

The "functions" list also violates Justice Kennedy's concurrence. Justice Kennedy allows jurisdiction when a water "significantly affects" the "chemical, physical, *and* biological integrity" of "waters more readily understood as 'navigable'." *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added). By contrast, the WOTUS Rule does not apply Justice Kennedy's conjunctive and holistic requirement, asserting jurisdiction when *either* the "chemical, physical, *or* biological integrity" of a water is significantly affected. 33 C.F.R. § 328.3(c)(5) (emphasis added). By requiring an effect only on one of the three factors (chemical, physical, or biological), and in fact based on only one of the nine listed "functions," the Agencies effectively "dilute" Justice Kennedy's significant nexus test by more than two-thirds and replace a holistic and comprehensive view of the integrity of navigable waters with one that allows the Agencies to cherry pick data tied to any one of several narrow factors to suit their desired policy results.

iv. The WOTUS Rule Violates *Rapanos* And The CWA By Including All Interstate Waters, Regardless Of Their Relationship to Navigable Waters

The Agencies assert unqualified jurisdiction over "*all* interstate waters," even if they are not navigable. 33 C.F.R. § 328.3(a)(2). This assertion violates the plain text of the CWA

limiting the Agencies' jurisdiction to "navigable waters" and *Rapanos.* In *Rapanos* Justice Kennedy tied the definition of "navigable waters" to waters that are "navigable in fact or that could reasonably be so made." *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring). Inclusion of *all* interstate waters, not matter what connection (if any) they maintain to a navigable water is in clear violation of the CWA and Justice Kennedy's significant nexus test.

C. The CWA Does Not Authorize The Expansive And Transformative WOTUS Rule

The WOTUS Rule exceeds the statutory authority delegated to the Agencies by Congress. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," courts require a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Similarly, Congress does not grant a "transformative expansion" of authority to regulate matters of "vast economic and political significance" absent a clear statement. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotations omitted) ("*UARG*"). Such statements are missing here.

The Supreme Court in *SWANCC* noted that the Corps' attempts to extend its jurisdictional reach to isolated ponds not adjacent to open waters implicated concerns of "significant impingement of the States' traditional and primary power over land and water use," and the potential to "readjust the federal-state balance." *SWANCC*, 531 U.S. at 174. So the Court "read the statute as written to avoid the significant constitutional and federalism" concerns and rejected the Corps' attempt to regulate at, or beyond, the limits of Congress' power.[15]

[15] For these and other reasons the Agencies are not entitled to any deference under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984); *See Nat'l Mining Ass'n v. Kempthorne,* 512 F.3d 702, 711 (D.C. Cir. 2008) "Th[e] canon of constitutional avoidance trumps *Chevron* deference . . . we will not submit to an agency's interpretation . . . if it 'presents serious constitutional difficulties'.")

Similarly, in *UARG*, the Supreme Court rejected EPA's effort to expand significantly its regulation of greenhouse gas emissions, explaining that when an agency seeks to "bring about an enormous and transformative expansion" in its authority to make "decisions of vast 'economic and political significance'" under a "long-extant statute," it must point to a clear statement from Congress. 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The Court affirmed this principle in *King v. Burwell*, holding that courts are not to presume that Congress would implicitly delegate to agencies "question[s] of deep 'economic and political significance'" because, if "Congress wished to assign [such] question[s] to an agency, it surely would have done so expressly." 135 S. Ct. 2480, 2489 (2015) (citation omitted).

In the WOTUS Rule, the Agencies claim transformative authority to readjust fundamentally the federal-state balance of land and water use, implicating significant political and economic concerns. As the plurality noted in *Rapanos*, "extensive federal jurisdiction . . . would authorize the [Agencies] to function as [ ] *de facto* regulator[s] of immense stretches of intrastate land . . . with the scope of discretion that would befit a local zoning board." 547 U.S. at 738 (Scalia, J. plurality). By the Agencies' own admission, the WOTUS Rule will result in an increase in determinations of federal jurisdiction. 80 Fed. Reg. at 37101. The Agencies acknowledge that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea" and that the 100-year floodplain encompasses an even larger area. Economic Analysis 11, ID-20866. This increase in federal jurisdiction includes the same types of isolated waters at issue in *SWANCC* and *Rapanos*, and allows the Agencies to function as a zoning board with the authority to

prohibit effectively or control construction of roads and buildings, farming, and many other activities almost anywhere in the nation.

The WOTUS Rule also has significant economic implications for the landowners, businesses, and public agencies that will be subject to additional federal permitting requirements, demonstrating again the WOTUS Rule's transformative expansion of federal authority. As the Supreme Court observed recently, "[t]he costs of obtaining . . . a permit [from the Corps] are significant," *U.S. Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1812 (2016), and "the permitting process can be arduous, expensive, and long," *id.* at 1815. Indeed, more than a decade ago "[o]ver $1.7 billion [wa]s spent each year by the private and public sectors obtaining wetland permits alone." *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality) (quotation omitted). The WOTUS Rule's reach is far beyond waters, encompassing many land features that may rarely, if ever, contain water or have water pass through them. And the presence of any one of these jurisdictional land features on a parcel subjects the use of the entire parcel to federal scrutiny. The WOTUS Rule's expansion of the Agencies' authority will also result in lost opportunities when permits improperly required under the expanded federal regime are denied or are too costly to justify a project in the first place.

The Agencies cannot point to a clear statement from Congress authorizing such a transformative expansion of the Agencies' authority over local land and water use. The CWA's jurisdictional limitation on the term "navigable waters" cannot plausibly be construed to authorize clearly the wide reach of the WOTUS Rule. If anything, Congress's intent to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources," 33 U.S.C. § 1251(b), combined with the Supreme Court's repeated admonitions that the Agencies' jurisdiction must have some

significant nexus to navigable-in-fact waters, warrants narrowly construing the Agencies' jurisdiction.

II. THE WOTUS RULE VIOLATES THE UNITED STATES CONSTITUTION

The WOTUS Rule violates the U.S. Constitution in at least three significant ways. First, it violates the Tenth Amendment by intruding upon the Plaintiff States' sovereign interests in regulating their land and water resources as recognized by the reservation of state sovereignty and core federalism principles enshrined in the CWA. Second, it exceeds Congress's constitutional authority under the Commerce Clause because it provides for federal jurisdiction over isolated waters with no meaningful impact on or connection to interstate commerce. And third, it violates the Due Process Clause because it is unconstitutionally vague.

A. The WOTUS Rule Violates Plaintiff States' Rights Under The Tenth Amendment

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. CONST., Amend. X. The Plaintiff States unquestionably "retain a significant measure of sovereign authority . . . to the extent the Constitution has not divested them their original powers." *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 549 (1985). Under States' sovereign authority, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *accord City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States").

Congress expressly recognized the Plaintiff States' inherent powers over local lands and water resources in the CWA. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources."). In *SWANCC*, the Supreme Court

likewise recognized States' "traditional and primary power over land use" in rejecting the Corps' attempt to assert jurisdiction over isolated intrastate waters. 531 U.S. at 174. The Court noted that allowing the Corps' to assert jurisdiction over isolated intrastate ponds would "result in significant impingement of the States' traditional and primary power of land and water use." *Id.* Similarly, in *Rapanos* the plurality found that any federal attempt to regulate isolated intrastate waters would be "an unprecedented intrusion into traditional state authority," and would "stretch[] the outer limits of Congress' commerce power and raise[] difficult questions about the ultimate scope of that power." 547 U.S. at 738 (Scalia, J., plurality).

The WOTUS Rule's overbroad assertion of authority over local land and water features that have no or only a remote connection to navigable-in-fact waters invades the Plaintiff States' sovereign authority, in violation of their Tenth Amendment rights. The definitions in the WOTUS Rule extend federal jurisdiction to isolated, usually-dry, and entirely intrastate land and water features remote from any navigable waterway. The Agencies displace state and local land regulation, and act as a "*de facto*" federal "zoning board" for waters and lands traditionally under state regulations. *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). The issue is not merely the breadth of jurisdiction asserted by the federal government, but also the scope of regulatory power that the federal government would exercise in those areas. *See SWANCC*, 531 U.S. at 173.

The practical effect on the Plaintiff States from the WOTUS Rule's expansion of federal authority is breathtaking. From Prairie Potholes in North Dakota, to arroyos in New Mexico, and ephemeral drainages in Wyoming, the WOTUS Rule extends federal jurisdiction to virtually every potentially wet area of the country, including their associated dry land features. *See* 33 C.F.R. § 328.3(a). Once federal jurisdiction is triggered, the potential scope of that power is exceedingly broad. *See, e.g.*, 33 C.F.R. § 320.4(a) (identifying about 25 "public interest" factors

the Corps considers when determining whether to issue a section 404 permit, including economic, aesthetics, land use, historic properties, safety, and food and fiber production). The WOTUS Rule sweeps so broadly that the Agencies oddly find it necessary to explicitly disclaim authority over "puddles" and swimming pools "created in dry land." *Id*. § 328.3(b)(4).

North Dakota is particularly affected by the overreach of the WOTUS Rule. *See* ND Comments, ID-15365. North Dakota straddles the Central and Great Plains regions and has a relatively flat topography. *Id.* at 9. Floodplains under the WOTUS Rule will be miles wide, allowing the Agencies to assert jurisdiction over lands *miles* removed from any body of water. *Id.; see also* EmPowerND Comments 1-2, ID-13604 (noting that 6% of the North Dakota's total acreage is in floodplain areas); North Dakota Stockmen's Association ("NDSA") Comments 27, ID-13688 (noting that Prairie Potholes cover more than 300,000 square miles nationwide). The WOTUS Rule also overreaches to classify all Prairie Pothole wetlands, features abundant in North Dakota, as *per se* jurisdictional. *Id.* at 7. 33 C.F.R. § 328.3(a)(7)(i). But these geological areas of depression in North Dakota's plains occasionally fill with water on an approximate 200-year cycle where many depressions are functionally dry uplands or isolated wetlands for *most of the period of record,* only rarely connecting to other waters during extended wet periods. ND. Comments 6-7, ID-15365. Prairie Potholes are often remote and only remotely connected to navigable waters through several degrees of other water bodies. *Id.* Prairie Potholes are also closely linked to farming in North Dakota, and forcing them into a federal regulatory regime removes them from the expertise of local regulators and farmers who are better equipped to manage these lands. *Id.*

Alaska also presents a telling example of the breadth of the WOTUS Rule's expansion of federal authority. *See* AK DEC Comments 18–20, ID-19465. Forty-three percent of Alaska is

wetlands, covering more than 174 million acres. *Id.* at 4. Many of those wetlands are frozen much of the year, and are underlain with permafrost. *Id.* at 21. During the warmer seasons, the surface soils become inundated when thawing conditions generate near-surface water that cannot penetrate the underlying permafrost, causing the soils to exhibit wetland-like characteristics. *Id.* These areas can extend for hundreds of miles inland from the main navigable-in-fact waterways, as much of northern Alaska is covered in "continuous permafrost." *Id*. at 19. These lands are subject to federal jurisdiction by virtue of the WOTUS Rule's definition of neighboring: "The entire water is neighboring *if a portion* is located within 1,500 feet of the [OHWM] and within the 100-year floodplain." 33 C.F.R. § 328.3(c)(2)(ii) (emphasis added). As Alaska warned the Agencies, the Proposed Rule would "federalize land use decisions for State, local and private lands" in Alaska because "nearly all waters and wetlands in Alaska" would be subject "to regulation by the EPA and the Corps." AK Gov. Comments 1, ID-19465. This conclusion applies equally to the WOTUS Rule.

The City of Scottsdale, Arizona provides another compelling example in a completely different ecological region. *See* City of Scottsdale Comments, ID-18024. The City is replete with ephemeral drainages that flow in response to "high intensity and short duration storms." *Id.* at 3. The flow is limited in duration, and typically infiltrates through the highly permeable soils long before it could reach a navigable-in-fact water, if at all. *See, e.g., id.* (describing Rawhide Wash as flowing 0.014% of the time over a 15-year period). A single storm may produce flow in one wash, but others a mile away could be bone dry. *See id.* All washes in the region are marked by a bed and banks and an OHWM, sometimes created after a single rain event. *See id.* These dry washes will be *per se* jurisdictional under the WOTUS Rule, despite not having any

connection to navigable waters and historically being treated as non-jurisdictional under the Agencies' post-*Rapanos* guidance. *See id.* at 4.

The Agencies are asserting jurisdiction over traditionally State-regulated waters and associated lands, impairing the Plaintiff States' authority to establish and enforce their own policies for their waters and lands. Any implication that waters and lands falling outside federal CWA jurisdiction are somehow "unregulated" and thus "unprotected" must be rejected: what is at issue here are the limits of federal jurisdiction, not environmental protection. Waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.,* N.D. Cent. Code Ch. 61-28.; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. § 8-4-101 *et seq.* Instead of Plaintiff States regulating the land and water within their borders to advance their own sovereign responsibilities to protect their resources and citizens, the WOTUS Rule would have them defer to the federal government's vast regulatory overreach. This intrusion into the "quintessential state activity" and historical powers over land-use violates the 10th Amendment.

B. The WOTUS Rule Exceeds Congress's Commerce Clause Authority

The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. That power extends only to three areas: (1) "channels of interstate commerce;" (2) the "instrumentalities of commerce;"[16] and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Congress exercises its Commerce Clause power "subject to the limitations contained in the Constitution," including the

[16] The WOTUS Rule is not based on a theory of jurisdiction in instrumentalities of commerce and Petitioner States therefore do not address it in this memorandum.

Tenth Amendment. *New York v. U.S.,* 505 U.S. 144, 156 (1992). Here, the "Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation" on Congress's Commerce Clause power. *Id.* at 157.

i. Channels Of Interstate Commerce

The WOTUS Rule exceeds Congress's delegable authority to regulate "channels of interstate commerce." As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress's "traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.'" 531 U.S. at 172; *id.* at 168 n.3 (finding no indication that "Congress intended to exert anything more than its commerce power over navigation"). The Court noted "Congress evidenced its intent to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term." *Id.* at 167. However, a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos,* 547 U.S. at 778 (Kennedy, J., concurring). The WOTUS Rule instead sweeps in many local land and water features that are not navigable-in-fact and have only an extremely tangential, if any, connection to navigable-in-fact waters, including dry or ephemeral stream beds that might flow just once every one-hundred years, as well as interstate waters the Agencies admit are not navigable.

In *SWANCC*, the Court rejected the Agencies' assertion of authority over similarly situated, isolated intrastate waters, noting that this authority was not "consistent with the Commerce Clause." 531 U.S. at 162. The Agencies implicitly acknowledged that their attempted jurisdictional reach was beyond the channels of interstate commerce by seeking to justify it under the third prong of Commerce Clause power, which the Court declined to assess under constitutional avoidance principles. *Id.* at 173 ("Respondents argue that the . . . [r]ule . . .

falls within Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce.").

Rapanos also touched on the limits of the Agencies' Commerce Clause authority under the CWA. The plurality noted that the CWA provides for regulation of waters "*other than* those . . . used . . . to transport interstate or foreign commerce," but ultimately did not need to decide the precise limits of CWA jurisdiction over *waters*, as the Agencies' had tried to regulate non-waters, or dry lands. 547 U.S. at 731-732. (Scalia, J., plurality). The concurrence devised a significant nexus test it claimed would avoid "serious constitutional or federalism difficulty" in the context of waters "*that are adjacent to tributaries*." *Id.* at 782 (Kennedy, J., concurring) (emphasis added). The concurrence's significant nexus test was applied to the prior codification of 33 C.F.R. § 328.3 (effective to August 27, 2015), which was much narrower than the WOTUS Rule. This new assertion of even broader federal jurisdiction raises "serious constitutional or federalism difficulties" that *Rapanos's* concurrence did not address and exceeds the Agencies' authority to regulate the use of channels of interstate commerce. Furthermore, the Agencies' attempt to reassert jurisdiction over non-navigable interstate waters in the WOTUS Rule, regardless of their connection to navigable waters, exceeds the Agencies' authority to regulate channels of interstate commerce.

ii. Activities Substantially Affecting Interstate Commerce

The WOTUS Rule also exceeds Congress's delegable authority to regulate economic activities that "substantially affect interstate commerce." When a regulation or statute implicates the Commerce Clause, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Lopez,* 514 U.S. 549, at 562 (citing *United States v. Bass,* 404 U.S. 336, 349 (1971).

In *Lopez*, the Court determined that the law reached activity—specifically, the possession of a firearm in a school zone—that was "in no sense an economic activity." 514 U.S. at 567. The Court rejected the argument that Congress had the authority to reach this non-economic activity because, in aggregate, guns in school zones would not have a substantial effect on interstate commerce. That aggregation would involve "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. The WOTUS Rule involves precisely this piling on of speculative inferences to regulate similarly non-economic activities.[17] As the *Rapanos* plurality observed, "[i]n deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'" 547 U.S. at 721 (Scalia, J., plurality) (quoting 33 C.F.R. § 320.4(a) (2004)). The Agencies could prohibit an individual from disposing of leaves or brush in a shallow swale on his or her property provided that the swale is within 1,500 feet of the OHWM of a "tributary" to a navigable water, or if a bird nested in the swale for a portion of its life cycle before leaving for a navigable water not hydrologically connected to the swale. That is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. The same analysis applies to the Agencies attempt to regulate *all* interstate waters, regardless of their connection to a navigable water. Many interstate waters have no connection to a water that is "navigable in fact or that could reasonably be so made." *Rapanos,* 547 U.S. at

[17] While the WOTUS Rule certainly creates economic burdens, as evidenced by sections III and IV, these burdens are unrelated to interstate commerce, but rather only result from the Agencies' regulatory overreach.

759 (Kennedy, J., concurring). These waters thus have no ability to "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 567.

The WOTUS Rule also fails to "express[ly] . . . limit its reach to [activities that] have an explicit connection with or effect on interstate commerce." *Id.* at 562. Under the WOTUS Rule, there is no rational basis for concluding that failure to regulate activities such as leaf or yard waste disposal into dry stream beds that "contribute[] flow"—no matter how ephemeral or infrequent—"either directly *or through another water*" to a navigable water significantly affects interstate commerce. 33 C.F.R. § 328.3(c)(3) (emphasis added).

Because the WOTUS Rule violates Congress's delegable Commerce Clause authority, it also violates Plaintiff States' rights under the Tenth Amendment. *New York,* 505 U.S. at 157.

C. The WOTUS Rule Violates The Due Process Clause

"No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST., Amend. V. A statute or regulation is constitutionally invalid under the Due Process Clause if it prohibits conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A law is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Chicago v. Morales*, 527 U.S. 41, 56 (1999) (internal quotation omitted). Vagueness concerns are particularly acute where, as with the CWA, the law at issue involves a criminal prohibition. *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Under these standards, the WOTUS Rule is unconstitutionally vague.

The Agencies' repeated failures to provide a lawful definition for the statutory term "navigable waters" threaten that term's legality. As Justice Kennedy noted recently in an opinion joined by Justices Thomas and Alito, "the [CWA's] reach is 'notoriously unclear' and the

consequences to landowners . . . can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)). This lack of clarity "raise[s] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Id*. at 1817. For the third time the Agencies have promulgated an interpretation of the term "navigable waters" that cannot withstand constitutional scrutiny, including because it is vague and "essentially limitless," *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring). And, as the Supreme Court has explained: "the failure of persistent efforts. . . to establish a standard" under a broadly worded statutory phrase can lead the courts to declare that phrase unconstitutional. *Johnson*, 135 S. Ct. at 2558 (quotation omitted).The WOTUS Rule's tributary definition fails to provide notice to ordinary people of what waters and lands are subject to CWA jurisdiction. Tributaries are defined, in part, as water "characterized by the presence of the physical indicators of a bed and bank and an [OHWM]," that "contributes flow, either directly or through another water" or through "any number of downstream waters" to a navigable water, but may also have any number of "constructed" or "natural breaks" along the path of contributing flow. 33 C.F.R. § 328.3(c)(3). The Corps' 2004 Field Guide explains, "selection of reliable OHWM field indicators [is] challenging" and "especially difficult in arid regions" even for present channels.[18] The Agencies explain that they will use remote sensing and desktop tools to determine the OHWM and bed and banks of tributaries where "physical characteristics of bed and banks and another indicator of [OHWM] are absent in the field." 80 Fed. Reg. at 37077. In other words, even with no evidence

[18] R.W. Lichvar & J.S. Wakeley, U.S. Army Corps of Eng'rs, *Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States* (2004), http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/; *see also* AMA Comments 10, ID-13951

of a bed and bank to the naked eye, the Agencies can assert federal jurisdiction over an indentation on the landscape that appears through sophisticated digital photography and satellite imaging to which ordinary people lack access, and would not have the expertise to interpret even if they did have access.

The WOTUS Rule's inclusion of "[d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, [and] [d]itches, regardless of flow, that are excavated in or relocate a tributary" is similarly unconstitutionally vague. 80 Fed. Reg. at 37078. The Agencies explain that the ditches will be identified by the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." *Id*. at 37,078–79. It is exceedingly difficult (or impossible) under this standard for an ordinary individual to know if a ditch will be covered. Even if the individual has the capability to conduct historical research, it is unclear how far back in time the individual must look for a previously existing tributary and whether that person would have the expertise to know what to look for.

The WOTUS Rule's case-by-case waters category presents similar problems for landowners, amplified by the Agencies' broad discretion in making case-by-case decisions and the possibility of inconsistent outcomes. The Agencies will look at any water that is "[at least partially] located within the 100-year floodplain of a" navigable water or "waters [at least partially] located within 4,000 feet of the high tide line or [OHWM] of a" navigable water, impoundment, or tributary, 33 C.F.R. § 328.3(a)(8), and then engage in a largely unguided case-by-case analysis, looking at whether the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological

integrity of a [navigable] water" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5). Given the number of factors that the Agencies' staff must consider, *see, e.g.*, 80 Fed. Reg. at 37093 (referencing sediment trapping, nutrient recycling, food export, flood control, and many other factors), the public will not know how any particular jurisdictional inquiry will turn out, nor may they have any reason to believe that an inquiry is even necessary.

Typically, a person subject to the law has no way to know his or her land contains a water of the United States before an enforcement action is commenced, unless he or she requests a jurisdictional determination. That the Corps *voluntarily* provides jurisdictional determinations (and is not required by the CWA or otherwise to continue to do so) does not render the the WOTUS Rule any less vague or excuse the unconstitutional vagueness. *See Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring) (noting that the CWA's "reach is 'notoriously unclear'" and that the Corps' jurisdictional determinations have "no legally binding effect on the [EPA]." (citations omitted)). That the Corps finds it necessary to provide clarification by offering jurisdictional determinations outside the permitting process (even under the pre-WOTUS Rule regulations) only furthers the conclusion that the Agencies' regulations are unconstitutionally vague.

III. THE WOTUS RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The APA establishes procedures, requirements, and standards governing the promulgation and review of agency rulemakings. 5 U.S.C. § 500 et seq. Here, the Agencies have violated two critical requirements of the APA: (1) failing to comply with the requirements of notice-and-comment rulemaking, and; (2) promulgating a rule that is arbitrary and capricious and unsupported by the administrative record.

A. The Agencies Failed To Comply With Statutory Notice-and-Comment Procedures

The APA's notice-and-comment mandate, 5 U.S.C. § 553(b), is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union*, *United Mine Workers of America v. Mine Safety and Health Admin.,* 407 F.3d 1250, 1259 (D.C. Cir. 2005). These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). A final rule must be a "logical outgrowth" of the proposal. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citations omitted). The D.C. Circuit has explained that adopting a rule that is not a logical outgrowth of the proposal "almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

The WOTUS Rule is a textbook example of insufficient notice-and-comment resulting in a procedurally flawed and arbitrary and capricious rule. The Agencies built the jurisdictional reach of the term "navigable waters" around definitional changes never noticed in the Proposed Rule. These definitions included: distance-based criteria affecting adjacent waters, distance- and connectivity-based criteria affecting case-by-case waters, and exclusions for farming and ranching uses. The lack of notice deprived parties of the opportunity to comment meaningfully on those criteria, thereby undermining informed agency decision-making. These failures, in turn, contributed to the promulgation of the WOTUS Rule that is unsupported by anything approaching adequate record evidence, undermining meaningful judicial review.

Small Refiner examines what notice is sufficient for a final rule to be a "logical outgrowth" of a proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983). In *Small Refiner*, the EPA "gave general notice that it might make unspecified changes in the definition of small refinery." *Id.* at 549. Ultimately, the EPA adopted a past ownership requirement that excluded refineries owned by a larger refinery before an arbitrary, unmentioned date. *Id.* at 514. In invalidating the final rule, the D.C. Circuit noted that the "[a]gency notice must describe the range of alternatives being considered with reasonable specificity." *Id.* at 549. A final rule satisfies that test if affected parties "should have anticipated that [the] requirement" embodied in the final rule might be adopted. *Id.*

The WOTUS Rule includes distance-based criteria, connectivity-based criteria, and other provisions that are central to the WOTUS Rule but were never noticed in the Proposed Rule.

i. Distance-Based Criteria For Adjacent Waters

The Proposed Rule defined "adjacent waters" as all waters within a so-called "riparian area" or "flood plain" of a navigable water. 79 Fed. Reg. at 22269. The WOTUS Rule adopted three entirely new distance-based criteria to define adjacency: (1) waters within 100 feet of a navigable water, impoundment, or "tributary;" (2) waters within a 100-year floodplain and 1,500 feet of a navigable water, impoundment, or "tributary;" and (3) waters within 1,500 feet of the high-tide line of a navigable water. 33 C.F.R. § 328.3(c)(2).

None of these three central "adjacency" distance-based criteria appeared in the Proposed Rule or are a logical outgrowth of the proposal, because no interested party "should have anticipated" them. *Small Refiner*, 705 F.2d at 549. Had proper notice been given, the public would have submitted comments addressing the legality and practical import of such criteria, including whether they had any merit at all.

Even the Corps was in the dark about these significant modifications to the Proposed Rule until months after the close of the public comment period. *See* Moyer Memorandum 1, ID-20882 ("It was unknown to the Corps until early February [2015] that Army and EPA were contemplating a "bright-line" cut off of CWA jurisdiction either 5,000 or 4,000 linear feet from the [OHWM].").

The Agencies have argued that they did not violate the APA because they sought comment on "'establishing specific geographic limits' for adjacency such as 'distance limitations.'" Dkt. 66, at 12 (quoting 79 Fed. Reg. at 22208–09[19]). This request was in the context of "using *shallow subsurface or confined surface hydrological connections* as a basis for adjacency." 79 Fed. Reg. at 22208 (emphasis added); *see* note 19 below. Unspecified distance limitations based on hydrological connections are a far cry from the WOTUS Rule's imposition of precise physical distances between waters (or dry land features) and other waters with no hydrological connections. Asking about the merits of "geographical limitations" in general does not establish a predicate that allows the Agencies arbitrarily to pick for the final rule, any distance-based criteria.

The proposed definition of "neighboring" was rooted in "riparian" and "floodplain" proximity, with no hint of distance-based criteria. *Id.* at 22263. Riparian was proposed as the "transition between terrestrial and aquatic ecosystems" and "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." *Id.* at 22196, 22199. Floodplain was described as "an area bordering inland or coastal waters . . . formed by sediment deposition . . . and is inundated during

[19] The full text of the relevant portion of the sentence being: "establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent." 79 Fed. Reg. at 22208.

periods of moderate to high water flows." *Id.* at 22199. Nothing in this proposed language suggests that arbitrary numerical distance limitations, unrelated to the actual ecological and hydrological connection of waters, would be adopted in the WOTUS Rule. This Court wrote that the "definition of 'neighboring' under the final rule is not likely a logical outgrowth of its definition in the proposed rule," observing that the "final rule greatly expanded the definition of 'neighboring' such that an interest person would not recognize the promulgated rule as a logical outgrowth of the proposed rule." *See,* PI Order, ECF No. 70 at p.14. Additionally, the mention of "moderate" flows in the proposed description of floodplain does not indicate that flows as rare as a once in one-hundred year event would be chosen as a benchmark. As in *Small Refiner,* the Agencies failed to "describe the range of alternatives being considered with reasonable specificity." 705 F.2d at 549.

The Agencies' approach resulted in a final rule never "tested via exposure to diverse public comment," and was adopted in a manner manifestly "[un]fair[] to affected parties," including because it gave "affected parties [no] opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union*, 407 F.3d at 1259. It also deprived the Agencies of information from those "most interested" and "best informed" about this subject matter: the regulated community and the state regulators who implement the CWA and related state programs at the field level. *See Phillips Petroleum*, 22 F.3d at 620.

ii. Distance And Connectivity-Based Criteria For Case-by-Case Waters

The Proposed Rule defined a category of case-by-case waters that would be subject to CWA jurisdiction in the event the Agencies determined *any other water* had a "significant nexus" with a navigable water, with "significant nexus" defined, in part, as "significantly affect[ing] the chemical, physical, or biological integrity of a water identified" as jurisdictional.

79 Fed. Reg. at 22263. Many parties raised concerns about the expansive reach of the Agencies' ability to determine that *any other water* was jurisdictional on a case-by-case basis. *See, e.g.,* ND Comments 4, 14-15, ID-15365; AK DEC Comments 12, ID-19465, at 91.

The Agencies sought to address the illegality of their proposal by including in the WOTUS Rule quantitative and other criteria not suggested in the Proposed Rule. The case-by-case analysis would now consider as jurisdictional: (1) waters within the 100-year floodplain of a navigable water; and (2) waters within 4,000 feet of the OHWM or high tide line of a navigable water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8); 80 Fed. Reg. at 37105. The WOTUS Rule also added nine functional criteria[20] that did not appear in the proposal, and defined the terms "OHWM" and "high tide line" for the first time. *Id.* § 328.3(c)(5). This Court concluded that "when the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule. Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *See*, PI Order, ECF No. 70 at p.15.

The most the Agencies have been able to muster in support of proper notice is the Proposed Rule's observation that "'distance of hydrologic connection' is one of the factors that could be considered when evaluating a connection with a downstream water." Dkt. 66, at 12, n.3 (quoting 79 Fed. Reg. at 22214). But this opaque sentence, which has nothing to do with the

[20] The functions being: (i) Sediment trapping, (ii) Nutrient recycling, (iii) Pollutant trapping, transformation, filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vi) Contribution of flow, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species in a water identified in paragraphs (a)(1) through (3) of this section. 33 C.F.R. § 328.3(c)(5).

nine functional criteria or definitions of OHWM or high tide line, appeared to be addressing factors that the Agencies would consider *in conducting* a case-by-case determination. Limited by its own terms to the context of hydrologic connections, this vague observation did not suggest that the Agencies were considering or requesting comments on specific distance-based criteria, including when there is no hydrological connection. The subsections of the proposal that follow this single sentence consist of three-and-a-half pages discussing potential requirements for case-by-case waters, and *none* of the approaches contemplates adopting criteria based on specific distances from specific reference points or the other new criteria that appeared for the first time in the WOTUS Rule. *See* 79 Fed. Reg. at 22214–17.

iii. The Farm And Ranching Exclusions

The Agencies adopted an exclusion in the WOTUS Rule stating "waters being used for established normal farming, ranching, and silviculture activities" were exempt from *per se* jurisdiction under the WOTUS Rule's adjacency category, but not from the tributary category. 33 C.F.R. § 328.3(c)(1); 80 Fed. Reg. at 37105. At no point in the Proposed Rule did the Agencies notice that they were considering treating farmland differently as between the "adjacent" and "tributary" waters. In fact, the Agencies specifically stated in the Proposed Rule *in four separate locations* that it would "not affect any of the exemptions provided by the CWA section 404(f), including those for normal farming, silviculture, and ranching activities." 79 Fed. Reg. 22218; *Id.* at 22189, 22193, and 22199. Had the Agencies informed the public that they were contemplating this exclusion within part of the statutory definition, the Plaintiff States and affected farmers would have submitted comments on the proposed changes. If the Agencies have given notice that this farmland exclusion was under consideration, the States would have argued that the exclusion should be expanded to cover both *per se* categories, which is why the unexpected addition of an exclusion that benefits the States' farmers prejudice the States.

B. The WOTUS Rule's Expansive Interpretation Of "Significant Nexus" Is Arbitrary And Capricious

A rule is arbitrary and capricious if it is unsupported by the record. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43-44 (1983). The Agencies claim that the WOTUS Rule is grounded in sound science—indeed, the term "science" is repeated over seventy times in the preamble to the WOTUS Rule, with another forty-six references to the Agencies' Final Connectivity Study.[21] The Agencies also claim that science, as documented in the Final Connectivity Study, shows that Justice Kennedy's significant nexus test is satisfied by the WOTUS Rule's expansive new definition of WOTUS. In fact, the Final Connectivity Study highlights a fundamental disconnect between the actual science in the record and the Agencies' portrayal of that science in justifying the WOTUS Rule.

According to the preamble to the WOTUS Rule, the scientific basis is that water flows downhill to create hydrological connections and that the "protection of upstream waters is critical to maintaining the integrity of the downstream waters." 80 Fed. Reg. at 37063, 37056. This assertion is nothing but a truism and implies a limitless expansion of federal power. There is no debate that upstream waters contribute to downstream waters, but that only establishes—at most—a "nexus" between the two (not every water has a downstream connection). For CWA jurisdictional purposes, any such nexus, it must eventually be a link to a navigable water, and not any nexus will do: the upstream waters must have a "significant nexus" with downstream navigable waters.

Whether there is a nexus between upstream waters and downstream navigable waters, and whether any such nexus is "significant" are the key legal questions that, as the Agencies acknowledge, *science does not answer*. "While the agencies agree defining significant nexus by

[21] These numbers are based on a pdf word searches of "science" and "Science Report," in the preamble to the WOTUS Rule, 80 Fed. Reg. 37054.

quantified metrics would improve clarity, for the reasons discussed in the Science Report . . . such an approach is not supported by the science at this time." Response to Comments, Topic 9, 23, ID-20872. This does not come as a surprise, since the Draft Connectivity Study available during the public comment period was, as the title reveals, focused on "connectivity." ID-0004. The term "navigable" does not appear in the Draft Connectivity Study except in one citation in the long list of references. *Id.* Thus, the Draft Connectivity Study has little to offer on the central term that defines the Agencies' CWA jurisdiction: "navigable waters." The terms "significant nexus" or "significant connection" also do not appear. *Id.*

The Final Connectivity Study, published by the EPA two months *after* the close of the public comment period, also does not mention "navigable waters" and "significant nexus," but not in a meaningful way. *See* ID-20859. The Final Connectivity Study's attempt to translate Justice Kennedy's significant nexus test into scientific terms exemplifies these shortcomings:

Table 1-1. Translating connectivity-related questions between policy and science. This table presents a crosswalk of regulatory and scientific questions this report addresses. Policy questions use regulatory terms (shown in quotation marks) that lack scientific definitions or are defined differently in scientific usage. All terms used in this report reflect scientific definitions and usage.

Policy Question	Science Question
What tributaries have a "significant* nexus" to "traditional navigable waters"?	What are the connections to and effects of ephemeral, intermittent, and perennial streams on downstream waters?
What "adjacent" waters have a "significant* nexus" to "traditional navigable waters"?	What are the connections to and effects of riparian or floodplain wetlands and open waters on downstream waters?
What categories of "other waters" have a "significant* nexus" to "traditional navigable waters"?	What are the connections to and effects of wetlands and open waters in non-floodplain settings on downstream waters?
* "Significant," as used here, is a policy determination informed by science; it does not refer to statistical significance.	

ID-20859, at p. 1-2. Each relevant "policy question" was translated into a "science question" that removed the key issues in this case: "navigable waters" and "significant nexus," and replaced them with generic concepts, such as "connections" between "waters," with no reference

to whether they are connections to navigable waters or whether the connections are significant. The explanation states that "policy questions" (i.e., the ones at issue in this case) either lack scientific definitions or are defined differently by science and that all the terms used in the Final Connectivity Study reflect scientific usage; i.e., the Study does not address or answer the "policy questions." *Id.* Science also does not save the WOTUS Rule from its fatal Constitutional defects (discussed above in section II). For example, scientific discussions of "connectivity" do not cure the WOTUS Rule's violation of the Commerce Clause (which involves a different set of connections) or render the unconstitutionally vague provisions of the WOTUS Rule suddenly clear.

The Agencies admit that while "[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters . . . it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA." *Id.* at 21. The Agencies made that determination based largely on legal and policy considerations, not on the science (or anything else) in the record. *See id.* at 17 ("The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health."). The Agencies' many references to the Final Connectivity Study fail to provide record support for the essential question of the *significance* of the nexus between isolated waters and navigable waters or many of the specific criteria arbitrarily selected by the Agencies (e.g., the distance-based criteria). Further, the term "connectivity" is not the same or equivalent of the term "nexus" used in the WOTUS Rule. The term "connectivity" does not appear in the WOTUS Rule, and the WOTUS Rule's detailed definition of "significant nexus" includes many factors and technical criteria that are not in the

Final Connectivity Study's short and simple definition of "connectivity."[22] As a result, the difference between the WOTUS Rule and the Final Connectivity Study is not just the lack of the concept of "significance" in the study; rather, the terms "nexus" and "connectivity" are defined differently in the two documents, and one cannot transfer the conclusions of the study to the WOTUS Rule by simply attaching the policy concept of "significance" to the term "connectivity."[23]

The Agencies own statement makes it clear that science does *not* determine when the nexus between upstream and downstream waters becomes "significant." Instead significance in the WOTUS Rule rests on other, non-scientific, factors: the Agencies' interpretation of the statute and Supreme Court opinions, and "the agencies' expertise." *See id*. at 17 (quoted above). The former are not the special purview of the Agencies, and are ultimately for this Court, which leaves the Agencies' relying on their "expertise" as the essential record-based linchpin of the WOTUS Rule. *See id.* at 21.

Grounding "significant" in the WOTUS Rule on the Agencies' "expertise" and "practical experience" is arbitrary and capricious for two separate reasons: First, the Agencies' pre-Rule experience was with "existing procedures and guidance that often depend[ed] on individual, time-consuming, and *often inconsistent* analyses of the relationship between a particular stream, wetland, lake, or other water with downstream navigable waters." Final EA at 3, ID-20867. "Often inconsistent" agency experience cannot and does not justify the Agencies' many

[22] "The degree to which components of a river system are joined, or connected, by various transport mechanisms; connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system." Final Connectivity Study p. A-2, ID-20859.

[23] Another example of why the Final Connectivity Study cannot be relied on to support the WOTUS Rule is in the discussion of "tributaries." The Connectivity's simple definition, "a stream or river that flows into a higher order stream or river," bears no relationship to the long definition in the WOTUS Rule, rendering any effort to transfer the Study's discussion of "tributaries" to the WOTUS Rule suspect. Final Connectivity Study p. A-13, ID-20859.

determinations in the WOTUS Rule about when a "nexus" between upstream and downstream waters is "significant." Second, nowhere in the record do the Agencies explain how they applied their "experience" or "expertise" to determine precisely where on the "continuum of connectivity," a "nexus" between upstream and downstream waters becomes a "significant nexus." Response to Comments, Topic 9, at 23, ID-20872. For example, there is nothing in the record, including the Agencies' expertise, that explains the imposition of specific distance-based criteria or what specific expertise led the Agencies to conclude that it was the lack of hydrological connections supported their conclusion that Prairie Potholes could be "navigable waters." Absent that explanation, the record fails to support a central determination made in the WOTUS Rule.

The determination of a mere existence of a connection—*even a continuous one*—is insufficient under Justice Kennedy's approach. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring). Nor is it consistent with the text of the statute. *SWANCC*, 531 U.S. at 172. But that is all the Final Connectivity Study shows. The Agencies have therefore failed to "articulate a rational connection between the facts found" and the expansive definitions in the WOTUS Rule, one of the hallmarks of arbitrary decision-making. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (citations omitted).

C. The WOTUS Rule's Treatment Of Distance, Connectivity, And Exclusion-Based Criteria Is Arbitrary And Capricious

A reviewing "court shall . . . hold unlawful and set aside" any final rules that are "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). An agency rule is arbitrary and capricious if an agency relies on factors that Congress did not intended it to consider, fails to consider an important aspect of the problem, explains its decision that sidesteps the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise. *State Farm,* 463 U.S. at 43. A rule is also arbitrary and capricious if it fails to "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). In addition, "conclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). Judicial review becomes "meaningless where the administrative record is insufficient." *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976).

The distance, connectivity, and exclusion criteria in the WOTUS Rule fail the APA's arbitrary and capricious standard. The Agencies argue that the distance-based criteria are "reasonable and practical," consistent with unspecified "experience," and supported by "the implementation value of drawing clear lines." 80 Fed. Reg. at 37085–91. Such "conclusory statements," unsupported by the record, are legally insufficient. *Amerijet*, 753 F.3d at 1350 (D.C. Cir. 2014). To the extent the record says anything about these criteria, the Agencies' SAB rejected any distance-based approach, arguing that "the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water." SAB 2–3, ID-7531.

Nothing in the administrative record supports the Agencies' decision to choose the specific distance criteria of 100 feet, 1,500 feet, 4,000 feet, a 100-year flood plain, rather than continue with the proposed riparian and subsurface hydrologic connection criteria. This Court observed that it was "unable to determine the scientific basis for the 4,000 feet standard," and that "the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable." *See*, PI Order, ECF No. 70 at p.13. Furthermore, nothing in the administrative record supports switching to distance-based criteria to determine jurisdiction over adjacent or

case-by-case waters. There is no "rational connection between the facts found and choice[s] made" by the Agencies, as there are no facts in the administrative record whatsoever. *State Farm,* 463 U.S. at 43.

IV. THE WOTUS RULE VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA requires federal agencies to prepare a detailed "environmental impact statement" (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS must include a "detailed [written] statement" about "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided." *Id*. An EIS should inform the decision-maker and the public of reasonable alternatives that are designed to minimize the adverse impacts or enhance the quality of the environment. *Id*.; *see also* 40 C.F.R. §§ 1502.1, 1508.11. An EA, on the other hand, is only suitable for a proposed action that will not have a significant impact on the environment. 40 C.F.R. §§ 1501.3, 1501.4.

NEPA requires "federal agencies to take a 'hard look' at the environmental consequences of major federal actions before they are taken." *Sierra Club v. United States Army Corps of Eng'rs,* 446 F.3d 808, 815 (8th Cir. 2006) (citations omitted). Unless exempted by statute, all agencies must comply with NEPA. 42 U.S.C. § 4332; 40 C.F.R. § 1507.1. EPA enjoys such an exemption for some activities under the CWA, *see* 33 U.S.C. § 1371(c), but the Corps does not.

As a part of its hard look "an agency is required to 'consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 242 (D.C. Cir. 2008) (citation omitted). A consideration of alternatives under NEPA ensures "a fully informed and well-considered decision" and rulemaking should be set aside for "substantial procedural or substantive

deficiencies." *Vermont Yankee Nuclear Power Corp., v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 551-58 (1978).

The Corps violated NEPA in two significant ways. First, the Corps failed to prepare an EIS for the WOTUS Rule, instead issuing a FONSI and a legally deficient EA. As one of the most far-reaching environmental regulations ever adopted, the WOTUS Rule easily qualifies as "a major federal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), and the Agencies' finding that WOTUS Rule has no significant impact on the human environment—based on the EA and FONSI—is arbitrary and capricious and must be set aside. *See Audubon Soc. Of Cent. Arkansas v. Dailey,* 977 F.2d 428, 434 (8th Cir. 1992). Second, the Corps also violated NEPA by evaluating an unreasonably restricted range of alternatives, considering only two options—the WOTUS Rule and a "no action" alternative in which the Corps would continue regulating under the existing rule and post-*Rapanos* agency guidance.

A. The Corps Failed To Prepare An Environmental Impact Statement

An agency's NEPA decision must be the product of "reasoned decision making," and "simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Del. Riverkeeper Network v. FERC,* 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotations omitted). Agency conclusions based on "unexplained conflicting findings about the environmental impacts" violate NEPA. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015). Here, the Corps violated NEPA by failing to prepare an EIS, a decision the Corps based on: (1) reliance on an insufficient EA and (2) failing to consider factors mandated for consideration by NEPA.

i. The Environmental Assessment Was Flawed And Failed To Take A Hard Look At The Environmental Consequences

In reviewing an agency's decision not to prepare an EIS, the Eighth Circuit has adopted the "hard look" doctrine requiring a consideration of the environmental consequences of agency action. *Audubon Soc. Of Cent. Arkansas v. Dailey,* 977 F.2d 428, 434 (8th Cir. 1992). "A proper consideration of the . . . impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993–94 (9th Cir. 2004) (finding an EA inadequate) (quotation omitted). The EA prepared by the Corps falls far short of the "hard look" that NEPA requires.

The "Environmental Consequences" section of the EA provides a brief, two-page summary of how much the WOTUS Rule will expand federal jurisdiction, but makes no serious attempt to assess the environmental and socioeconomic effects of that new federal jurisdiction. Final EA 21–23, ID-20867. Instead, the EA's "analysis" of environmental consequences, comprising only four pages, has sections relating to wildlife, recreation, and flood risk reduction. *Id*. at 24–27. Each of those sections contains only *two* or *three* short paragraphs, and only *one sentence* of analysis, each of which is conclusory and virtually identical. *Id*. Those single sentences of "analysis" assert that the extension of federal jurisdiction is expected to benefit the environment, but the Corps fails to support this assertion with any evidence or effort to quantify the benefits.

For example, the EA states "[t]he additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on recreation, based on the increase in wildlife available for hunting, fishing,

bird watching, and photography." *Id*. at 25. Nowhere does the Corps describe why it believes the WOTUS Rule will lead to an increase in wildlife or attempt to quantify that increase. And most important, the Corps fails to mention whether the Plaintiff States are already regulating the same waters under state law and whether the net effect of duplicative regulation would have any positive or negative effect on wildlife. This imprecision is precisely the kind of drive-by analysis courts have rejected under NEPA. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 996.

The fundamental purpose of NEPA to force federal agencies genuinely to consider the environmental costs and benefits of major federal actions is thwarted here by the Corps' refusal to analyze or quantify the environmental, socioeconomic, or other effects of its sweeping WOTUS Rule. The Corps' decision to avoid preparing an EIS also excluded the Plaintiff States from participating in the NEPA process for the WOTUS Rule as "cooperating agencies," *see* 40 C.F.R. §§ 1501.6 and 1508.5 (2018), further eroding the cooperative federalism principles enshrined in our nation's laws *and explicitly set forth in the CWA*. *See* George T. Frampton, *Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies To Be Cooperating Agencies* 2 (July 28, 1999), *available at* https://www.energy.gov/sites/prod/files/G-CEQ-DesigNonfedCoopAgencies.pdf.

ii. The Corps Failed To Consider Other NEPA-Relevant Factors In Its Decision Not to Prepare An EIS

The Corps' implausible conclusion that the WOTUS Rule does not significantly affect the human environment is not only unsupported by the EA, but was reached without considering legally-prescribed, mandatory factors for such assessments. And it is inconsistent with the Agencies' claims about the importance and value of the WOTUS Rule: they cannot have it both ways, defending the WOTUS Rule with exaggerated claims about its necessity and benefits, yet avoiding NEPA by downplaying its significance.

"Significance" under NEPA is defined in terms of "context" and "intensity." 40 C.F.R. § 1508.27 (2018)[24]. Context requires analysis of the effects on "society as a whole (human, national), the affected region, the affected interests, and the locality." *Id.* at (a). Intensity "refers to the severity of impact." *Id.* at (b).

The administrative record shows that the Corps did not consider either the "context" or the "intensity" factors in its NEPA analysis. The Corps' failure to consider these factors violates NEPA. *See State Farm*, 463 U.S. at 43 (vacatur is required if the agency "entirely failed to consider an important aspect of the problem"). In addition, both factors overwhelmingly support a finding that the WOTUS Rule will significantly affect the human environment.

1. *Context*

Context depends on "the setting of the proposed action." 40 C.F.R. § 1508.27(a) (2018). The WOTUS Rule is nationwide in scope, affecting all 50 States. It was the broad geographic reach of this regulation that partially prompted this Court to assert jurisdiction and issue a preliminary injunction. Dkt. No. 70, at 16 ("the Rule will irreparably diminish the States' power over their waters"). Given the uniform application to all 50 States, the Corps should have analyzed the national effects of the WOTUS Rule.

By the Agencies' own estimates, the WOTUS Rule will result in "an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional." Final EA 21, ID-20867. The Agencies' estimates are grossly understated, and significantly mislead the public about the regulatory and economic implications of the WOTUS Rule. For example, Kansas estimated a 460% increase in federal jurisdiction in that State alone, with another 133,000 miles of ephemeral streams newly subject to CWA jurisdiction. KS Comments 2 & App. A, ID-14794. Alaska is concerned that the WOTUS Rule will regulate "nearly all waters and wetlands" within

[24] As defined in the C.F.R., "significantly" is not constrained by bright line limitations.

that State. AK Gov. Comments 1, ID-19465. So too is New Mexico. NM ED Comments 10, ID-16552 (the WOTUS Rule "would in effect engulf all streams, drainage systems, and watersheds within the State"). Ninety-six percent of Arizona's streams "flow only part of the time or only in direct response to precipitation events," AZ DEQ Comments 2, ID-16437, and "approximately 80% of Wyoming's stream miles are intermittent or ephemeral." WY DEQ Comments 4, ID-18020. Even if the Agencies' estimates were accurate, the WOTUS Rule will have profound implications on federal and state regulatory programs, private landowners, and the regulated community. For example, the Agencies performed more than 400,000 jurisdictional determinations between 2008 and 2015. 80 Fed. Reg. at 37065. Even small percentage increases in jurisdiction will trigger thousands of additional federal regulatory interactions between the public and private sector each year.

More important, it is the total impact of the WOTUS Rule, not the percentage increase in its coverage that is relevant under NEPA. Yet the EA does not mention, let alone address, the total amount of additional jurisdictional waters or the related land features the WOTUS Rule covers. This was improper. See *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d 989 at 997. In fact, the Agencies affirmatively chose not to analyze these figures. Final EA 28, ID-20867 ("a determination was made that there would be an incremental increase . . .of waters found to be subject to jurisdiction . . . [n]o analysis was made to determine the actual number of acres of waters that would be and for this reason it is not possible to estimate the number of acres that would be captured").

The Corps simply ignored this "context" when proclaiming the WOTUS Rule lacks significant effect. If the Corps had sought to accurately quantify the actual impacts of the WOTUS Rule, there is no way it could have articulated a "rational connection" between these

impacts and its FONSI. *Bowman Transp.*, 419 U.S. at 285. Indeed, as the Corps' own staff recognizes, absent an EIS "it is not possible to estimate" or "verify" the percentage of water bodies that would be affected by the WOTUS Rule, and particularly by the changes made between the Proposed Rule and the WOTUS Rule. Moyer Memorandum, ID-20882. Instead, "[t]his is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS)." *Id*. at 3.

The Corps also ignored the very large regional variations in the nation's waterways when analyzing the potential effects of the WOTUS Rule. Geographical and hydrological features—including those covered by the "other waters category"—are not evenly distributed across the United States. *See, e.g.,* 33 C.F.R. § 328.3(a)(7). Although the Agencies knew of that fact, and were repeatedly reminded of it during the public comment period, they unreasonably failed to address this "context" in the EA. *See, e.g.*, AK DEC Comments 12, ID-19465. Instead, they relied on broad national averages to estimate the total costs and benefits associated with the WOTUS Rule, marginalizing the potentially disparate treatment for individual States. *See, e.g.*, Final EA 25–26, ID-20867 ("To estimate annual costs and benefits, the agencies uniformly applied the 2.8 and 4.6 percent incremental change in jurisdiction to the total costs and benefits for the Sections 311, 401, 402, . . . and 404 programs to account for an estimated increase in permitting and regulatory activities that would result.").

2. *Intensity*

The "intensity" factors also support a finding that the WOTUS Rule "significantly" affects the human environment. Ten specified factors measure the "severity of impact" associated with a federal action, and include

> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> …

> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
> …
> (10) Whether the action threatens a violation of Federal, State, or local law ….

40 C.F.R. § 1508.27(b) (2018). The administrative record shows that the Corps did not consider these, or *any* of the ten available factors. This does not meet the "hard look" standard. *Sierra Club,* 446 F.3d at 815; *see State Farm*, 463 U.S. at 43 (the agency "entirely failed to consider an important aspect of the problem").

Focusing on just of few factors, the WOTUS Rule rises to the level of significance that warrants full analysis in an EIS. For example, the WOTUS Rule is without a doubt highly controversial. *See* 40 C.F.R. § 1508.27 at (b)(4). "Controversy in the NEPA context does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (wide disputes about the loss of farmland acreage controversial enough to warrant EIS). This case is nothing if not a dispute over the expanding "size, nature, or effect" of the WOTUS Rule. The Corps failed to consider this factor in the EA.

The WOTUS Rule also establishes a precedent for future actions with significant effects and represents a decision in principle about future considerations, *see* 40 C.F.R. § 1508.27 at (b)(6), because it sets controlling guidelines for hundreds of thousands of future regulatory decisions, *see* 80 Fed. Reg. at 37065. Each positive jurisdictional determination rendered under the WOTUS Rule will have substantial legal, economic, and environmental impacts on the property where it is made and any projects planned for that property, often extending to property that has no direct relationship to jurisdictional waters. *See Hawkes*, 136 S. Ct. at 1814–15. Expanding federal jurisdiction necessarily increases this burden. In *Hawkes*, for example, the

required environmental analysis for a CWA permit was estimated at $100,000, and it can be much more. *Id.* at 1816.

Finally, as already discussed in section II.A., the WOTUS Rule "threatens a violation of Federal, State, or local law," 40 C.F.R. § 1508.27 at (b)(10), as dozens of organizations and States informed the Agencies during the public comment period on the Proposed Rule. *See, e.g.*, Multi-State Comments 2, ID-7988 ("the Proposed Rule . . . seeks to place the lions' share of intrastate water and land management in the hands of the Federal Government."); Waters Advocacy Coalition Comments 3–4, ID-14568 ("[P]roposed [R]ule federalizes waters . . . impinging on the States' traditional and primary power over land and water use"). Many of those same legal concerns were recognized by this Court and the 6th Circuit Court in temporarily staying the WOTUS Rule. Dkt. No. 70 ("Once the Rule takes effect, the States will lose their sovereignty over intrastate waters").

B. The Corps Failed To Consider A Reasonable Range Of Alternatives

The flawed EA and resulting failure to prepare an EIS fundamentally undermined the Corps' NEPA analysis of the WOTUS Rule, but it was not the only defect.

"An agency is required to 'consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" *Am. Radio*, 524 F.3d at 242 (citation omitted); *see also* 42 U.S.C. § 4332(C)(iii). The same holds true whether an agency is preparing an EA or an EIS. *Partners in Forestry Co-op.*, 638 F. App'x at 464. "[T]he purpose of an EA, which is defined in regulations of the Council on Environmental Quality (CEQ) as a concise document describing the environmental impacts of *proposed actions and alternatives,* 40 C.F.R. § 1508.9 (1992), is to provide the agency with the basic information needed to decide on the next step." *Charter Tp. Of Huron, Mich. V. Richards*, 997 F.2d 1168, 1174 (6th Cir. 1993) (emphasis added). Courts are skeptical when agencies unreasonably limit the range of

alternatives they consider. *See, e.g., Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006) (The Court noted it was "hard pressed" to understand limiting review to "three alternatives-approval, disapproval, or no action."). Here, the Corps considered only two alternatives – the proposed WOTUS Rule or no action. Final EA 3, ID-20867 ("This EA analyses the impacts of either . . . the proposed action . . . or selecting the No Action alternative."). Given the wide-ranging scope of the WOTUS Rule and the alternate approaches available, this range of alternatives could not comply with NEPA.

The Corps considered only one alternative to the WOTUS Rule, a "no action" alternative, where "the current procedures, processes, and definitions used by the USACE to complete jurisdictional determinations would continue to be utilized and the process and procedures would not be impacted by the changes to jurisdiction with the adoption of the final proposed rule." Final EA 23, ID-20867. The Corps did not consider the far different Proposed Rule as an option in its NEPA analysis. The Corps "considered whether to analyze the draft rule in th[e] Environmental Assessment, but removed it from further consideration because it is no longer a viable option to accomplish the purpose and need for action." *Id*. at 13. The Corps did not explain why it was not a "viable option" except that the decision was made "upon a review of the substantive comments received during the public comment period." *Id*.

What is most troubling about the Corps' limited consideration of alternatives is that several other feasible alternatives were available. Many State Plaintiffs submitted comments favoring an alternative that would adopt a narrower definition of WOTUS that would enable them to implement their own state laws and policies to protect their own lands and waters using their on-the-ground expertise. *See, e.g.*, ND Comments 14–15, ID-15365. The Corps should and could have addressed the alternative of limiting CWA jurisdiction to traditional navigable

waterways and waters that are closely tied to those waters along the lines set forth by the Supreme Court in *Rapanos*. Such an approach would enable state governments to tailor their own laws and regulations more closely to the topography of their land and to make local land use decisions more responsive to the local community directly affected, while still leaving genuine navigable waterways under federal regulation. *See* WY DEQ Comments 7, ID-18020.

Several commenters also suggested that instead of adopting a single, unitary definition for the entire country, separate definitions could be adopted on a regional or state-by-state basis. *See, e.g.,* AK DEC Comments 11–12, ID-19465; PA DOA Comments 2, ID-14465 ("Administering a detailed and specific but 'one-size-fits-all' definition applicable nationwide in States with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections."). Separate definitions would take into account the fact that a bed and banks may be indicia of streams in wetter parts of the country, but that in other regions beds and banks are often found in bone-dry washes. Regions with extensive farmland that becomes flooded only in rare wet years, such as the northern plains, could have a definition that takes this into account. ND Comments 6, ID-15365. The definition of WOTUS applicable to Alaska could specifically address the complications caused by widespread permafrost. AK DEC Comments 11–12, ID-19465. Separate state or regional WOTUS definitions are a perfectly reasonable and feasible alternative that should have been addressed in the EA.

The Corps failed "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," *Am. Radio*, 524 F.3d at 242 (citations omitted). The Corps' decision to ignore—without comment—the principle alternatives that had

been advocated by the Plaintiff States is arbitrary, capricious, and contrary to the fundamental objectives of NEPA.

CONCLUSION

For all the reasons stated above, the WOTUS Rule should be permanently enjoined and set aside. Plaintiff States' also request oral argument.

Respectfully submitted this 1st day of June, 2018,

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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: JENNIFER MOYER

Thursday, December 17, 2015

Washington, D.C.

The interview in the above matter was held in room 2247 Rayburn House Office Building, commencing at 10:04 a.m.

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Mr. McGrath. Okay. Well, thank you all for being here. This is a transcribed interview of Jennifer Moyer. Chairman Chaffetz requested this interview as part of the committee's investigation into the Waters of the United States rulemaking. Would you please state your name for the record?

Ms. Moyer. Jennifer Moyer.

Mr. McGrath. On behalf of the committee, I want to thank you for appearing here today and answering questions. And the chairman also appreciates your willingness --

The Reporter. Sir, if you could move the microphone closer. Thank you.

Mr. McGrath. So on behalf of the committee, I would like to thank you for appearing to answer our questions. And we appreciate you appearing voluntarily. My name is Bill McGrath. I'm staff director with Chairman Chaffetz' staff. And I would like to have everyone else in the committee who's here introduce themselves.

Ms. Aizcorbe. My name is Christina Aizcorbe. I am counsel with Chairman Chaffetz' committee staff.

Mr. Skladany. I am Jon Skladany from Chairman Chaffetz' staff.

Ms. Fraser. I am Beverly Britton Fraser with Mr. Cummings' staff.

Mr. Burns. Sean Burns with minority staff.

Ms. Rother. Katy Rother with majority staff.

Mr. Feeley. Drew Feeley with majority staff.

Mr. McGrath. Okay. With that, I would like to go over a few of

the ground rules and guidelines that we'll follow during today's interview. Our questioning will proceed in rounds. The majority will start and ask our questions first for an hour. And then the minority staff will have the opportunity to ask for an equal period of time if they choose. And we will alternate back and forth until the question interviewing is over.

Typically after each hour, we take a short break. But if you would like to take a break any other time, just let us know. As you can see, there's an official reporter taking down everything we say for a written record. So please give verbal responses to all the questions. Do you understand?

Ms. Moyer. Yes.

Mr. McGrath. So the court reporter can take a clear record, we'll do our best to limit the number of people directing questions to you during any given hour to just the people on staff whose turn it is. Please try to speak clearly so the court reporter can understand and so the folks down at the end of the table can hear you. It's important that we don't talk over each other, interrupt each other if we can help it. And that goes for everyone here.

We also encourage you to freely consult with your counsel if you choose. And you're appearing with counsel obviously. Would you please state your name for the record?

Ms. Navaro. My name is Ann Navaro. And I'm from the Office of the Chief Counsel with the Army Corps of Engineers.

Mr. Boyd. Milton Boyd with the U.S. Army Corps of Engineers

Office of Chief Counsel.

Mr. McGrath. All right. Thank you. We would also like you to answer questions in the most complete and truthful manner possible. So we'll take our time as we go through this. If you have any questions or don't understand one of the questions, just let us know as we go. If you don't know the answer to a question and honestly don't know it, it's not best to guess. Just give us your best recollection. And it's okay to tell us if you've learned information from someone else, just indicate how you received such information. And if there are things that you don't know or can't remember, just say so. And please inform us of who to the best of your knowledge might be able to provide a more complete answer to such questions.

You should understand that although this interview is not under oath, by law you're required to answer questions from Congress truthfully. Do you understand that?

Ms. Moyer. Yes.

Mr. McGrath. This also applies to questions posed by congressional staff in an interview. Do you understand that?

Ms. Moyer. Yes.

Mr. McGrath. Witnesses that knowingly provide false testimony could be subject to criminal prosecution for perjury or for making false statements. Do you understand that?

Ms. Moyer. Yes.

Mr. McGrath. Is there any reason that you would be unable to provide truthful answers to today's questions?

Ms. Moyer. No.

Mr. McGrath. Finally, I would like to note that the content of what we discuss here is confidential. We ask that you not speak about what we discuss in this interview to any outside individuals to preserve the integrity of our investigation. With that, that's the end of the preamble to this. Is there anything minority would like to add?

Okay. So it's currently 10:08. And we're going to get started with the first hour of questioning here.

EXAMINATION

BY MS. AIZCORBE:

Q All right. Thank you, Bill.

Ms. Moyer, you are currently employed at the Army Corps of Engineers. Is that correct?

A Yes.

Q What is your current position at the Corps?

A I am the chief of the Regulatory Program.

Q And how long have you been in this position?

A Since July 2014.

Q Okay. Where were you prior to this?

A I was the deputy chief of the Regulatory Program at Corps headquarters.

Q Okay. When did you begin with the Regulatory Office in the Corps?

A I started with the Regulatory Program in the Baltimore district in November of 2000 -- hold on I'm going to do my math, in

November of 1995.

Q Okay. And was that when you began at the Corps as well?

A No. I began with the Corps in January of 1994.

Q Okay. And can you briefly describe the Regulatory Office within the Corps?

A The Regulatory Program?

Q Yes. Sorry. The Regulatory Program.

A Sure, the Regulatory Program is charged with executing statutory responsibilities under section 404 of the Clean Water Act, sections 9 and 10 of the Rivers and Harbors Act, and section 103 of the Marine Protection Research and Sanctuaries Act.

Ms. Fraser. If I may, can you keep your voice up?

Ms. Moyer. I will do my best, yes. Please just let me know if I'm not talking loud enough.

BY MS. AIZCORBE:

Q And approximately how many employees are employed by the Regulatory Program?

A We have approximately 1,251 regulators that are supported by our appropriation. We then have eight Regulatory Program managers in our division offices. And we have eight of us at the headquarters offices that are supported by our general expenses account.

Q Okay. And these regulators are also employed by the Corps then?

A Yes.

Q Okay. What are your duties as chief and responsibilities

in this role?

A My primary responsibilities are associated with the overall direction of the statutory responsibility, so the overall management and oversight of the program as a whole. And that includes, development and oversight of the execution of the regulatory budget.

Q Okay. And how many employees report directly to you?

A Seven.

Q And are all of those within headquarters?

A Yes.

Q So all of the field or division employees that you spoke of before have managers not in headquarters, they're located elsewhere?

A Yes.

Q Okay. What is the relationship between the Corps and the Office of the Assistant Secretary for Civil Works?

A The Corps of Engineers is responsible for the day-to-day execution of, I'm going to speak specifically to the Regulatory Program, the day-to-day execution of the Regulatory Program. And the assistant secretary's office provides policy oversight of the Corps and is ultimately responsible for the policy decisions pertaining to the Regulatory Program.

Q Okay. Can you provide the names of the staff in the ASA and Corps offices who primarily worked on this rule?

A Sure. This has been a multiyear process. So the staff in the ASA's office who have worked on it, that's been Chip Smith. His supervisor is Let Mon Lee. And so Let Mon has had a role in this.

Certainly Ms. Darcy has participated. Her initial principal deputy was Rock Salt, so he participated in this. And Mr. Schmauder in the Army General Counsel's office has also had a role in this. Towards the end, Mr. Gib Owen was participating as well.

Q Those were all from the ASA's office?

A And Army General Counsel.

Q So Army General Counsel is not within the ASA's office. Is that correct?

A That's my understanding, yes.

Q Okay. And from your Regulatory Program, are there a set of employees there who primarily worked on the development of the rule?

A I don't understand.

Q Besides yourself, who in the Regulatory Program was involved in the rulemaking?

Ms. Navaro. Do you mean at headquarters or regardless?

Ms. Aizcorbe. I mean, if it's a large number, we can certainly start with headquarters. And you can just tell me generally if there are large numbers elsewhere.

Ms. Moyer. Sure. Within my office, through the time period, I mean, I was chief starting in July of last year. So prior to me, Meg Gaffney-Smith was the chief, so she was actively engaged.

The primary staff people were Stacey Jensen and David Olson, both on the Corps headquarters team. We've had developmental assignments who have come through the Corps headquarter staff who have also been involved in providing technical assistance.

BY MS. AIZCORBE:

Q Those were Corps employees?

A Yes.

Q And so Meg Gaffney-Smith, Stacey Jensen, David Olson were all within the Regulatory Program within the Corps?

A Yes.

Q Were there any other Corps employees outside of the Regulatory Program who were heavily involved, in your opinion, in the rulemaking?

A Yes. Within Office of Counsel, certainly there was Lance Wood. And David Cooper who is our chief counsel.

Q Okay. Okay. Great. What is the ASA's role in the Wetlands Program?

A That's the same as the Regulatory Program?

Q Sure.

A So that's providing the ultimate policy oversight to the Regulatory Program.

Q Okay. And is that the way you would also characterize the Pentagon's role in the Regulatory Program?

A Yes. The assistant secretary is the ultimate oversight. So she's in the Pentagon. That's our interaction with the Pentagon, is through the Assistant Secretary for Civil Works.

Q Okay. And so, just so I understand what you just said, regarding the communications that typically flow from the administration to the Regulatory Program in the Army Corps, those would

come directly from the Pentagon through Ms. Darcy to the Regulatory Program? Or are there any other interim steps regarding communications from the administration?

A They come from Ms. Darcy.

Q Okay. Is that the same or typical then that you would receive instruction directly from Ms. Darcy on all Corps rulemakings?

A Yes. I mean, I don't receive them directly from her. They come through our chain of command. They come to, say, for example, General Peabody or General Jackson, that's how they come. Or if I'm in a briefing with her, she may directly communicate them to a larger group.

Q Okay. Who from the ASA's office and the Corps would typically field calls from or participate in meetings with, the Pentagon regarding the Waters of the United States rulemaking?

Ms. Navaro. Can I just clarify, what do you mean when you're saying Pentagon?

Ms. Aizcorbe. Anybody from the administration that would be above the Corps. Any direction, we're trying to understand what the communication structure is.

Ms. Navaro. Are you making a distinction between Jo-Ellen Darcy, who was the assistant secretary for Civil Works, and people above her?

Ms. Aizcorbe. Yes.

Ms. Navaro. You are?

Ms. Aizcorbe. How is she receiving her direction?

Ms. Moyer. Okay. So if that's what you're asking, I don't

have --

Ms. Aizcorbe. If you don't have knowledge, that's fine.

Ms. Moyer. If that's what you're asking, I don't know how she's receiving her direction.

BY MS. AIZCORBE:

Q Okay. Would anybody -- let me back up. Were you ever participating in any meetings or calls with Ms. Darcy on the rulemaking?

A Yes.

Q Would anybody from the executive office of the President participate in or be otherwise represented in any of these meetings? And that would include the Council on Environmental Quality, OIRA, which is the Office of Information and Regulatory Affairs, or any other members of the administration?

A I was not in any meetings where Ms. Darcy was present where anybody from CEQ or OMB was also present. I was in some interagency review meetings where OMB was present, where other agencies were present where we were discussing the rule.

Q Okay. Were you ever invited to provide input in these calls and meetings?

A Well I was in meetings when OMB was there with other agencies and we were talking about the rule.

Q Okay. So you did actively participate in those meetings?

A On three occasions, yes.

Q Three occasions. Do you remember when these occasions were and who participated?

A It was after the rule was in OMB vetting, so after the 28th of May. There were two meetings with Transportation where OMB was present, EPA was present, and David Cooper and I were present, so two occasions. I don't remember the dates. And one with USDA representatives, EPA was there. Mr. Schmauder was at the USDA meeting. He wasn't at the two DOT meetings.

Q And regarding the USDA meeting, Mr. Cooper was also in attendance at that meeting?

A Yes.

BY MR. MCGRATH:

Q Was OMB present at all of those meetings, representatives?

A OMB representatives were at the three meetings I was at.

Q And who was that representative?

A Vlad Dorjets and Erin Burke. Erin was at least at the DOT meeting. I can't recall if she was at the USDA meeting.

Q And were any members of the Council on Environmental Quality at any of these meetings?

A I don't believe they were, not to my recollection, they weren't there.

BY MS. AIZCORBE:

Q Would any technical or policy decisions be made at these meetings?

A No.

Q They were just discussed at these meetings?

A Yes.

Q Okay. Were you ever asked to brief Mr. Schmauder or Assistant Secretary Darcy prior to these meetings?

A No.

Q In a briefing this week, Mr. Schmauder informed the committee staff that throughout the rulemaking, he brought you and Lance Wood in to meet with Assistant Secretary Darcy prior to every decision she made on this rule to get your opinion. Do you feel this is an accurate characterization?

Ms. Fraser. Excuse me, that was not the characterization of the briefing. She was brought into some meetings, not all.

Ms. Aizcorbe. You can address that in your hour, thank you.

BY MS. AIZCORBE:

Q Is that an accurate characterization?

A And I would answer that in the way that I wasn't aware of when Ms. Darcy was making key decisions. On four occasions prior to Ms. Darcy signing the rule on May 28th, I was brought in to brief her on key technical information.

Q So I understand, on four occasions you were brought in to brief Ms. Darcy prior to her signing the rule on key technical decisions?

A Yes.

Q And do you recall what decisions those were? Or was it a large number of technical aspects of the rule?

A We were briefing her on technical aspects as we were working through the interagency discussions in developing the rule to get it

to the interagency review process.

Q Okay.

A But I wasn't aware when Ms. Darcy was getting ready to make a key decision. So I can't really speak to what Mr. Schmauder briefed or didn't brief.

Q Okay. Thank you. Who did you report to throughout the rulemaking?

A My first line supervisor is Meg Gaffney-Smith.

Q And she reports to?

A Eddie Belk, who is the chief of Operations and Regulatory.

Q Okay. And who does Eddie Belk report to?

A Steve Stockton, who is the director of Civil Works.

Q And then Steve reports to?

A That's a good question. He is the civilian in charge of Civil Works. And at the time of the rulemaking, Major General Peabody is the military counterpart. And what is his title? It was the deputy commanding general --

Ms. Navaro. Deputy commanding general for Civil and Emergency Operations.

Ms. Moyer. -- for Civil and Emergency Operations. I have a hard time getting that title all in there.

BY MS. AIZCORBE:

Q Okay. Thank you. Would you communicate directly outside of these four meetings with Ms. Darcy at all about the rulemaking?

A To whom?

Q Did you communicate directly with Ms. Darcy about the rulemaking outside of these four meetings where you briefed her?

A No.

Q Did you communicate with Mr. Schmauder directly about the rulemaking?

A On occasion, yes. The core group of people, so that would be me, Lance Wood, David Cooper, we would have conversations with Mr. Schmauder. Oftentimes, EPA would be part of those conversations. But we did not, we, as that group, did not have conversations with Ms. Darcy.

Q Okay. What is Mr. Schmauder's role with the Army again? You said he was with the Office of General Counsel?

A Yes.

Q Do you know anything about his background?

A I don't. I don't know what Mr. Schmauder's background is.

Q Okay. Whether he served in the field or has any background in wetland issues or Clean Water Act issues?

A I don't know. I know for a while he worked for the Corps. And then he has worked at Army General Counsel. But other than that, I don't know specifics.

Q Okay. Did Mr. Schmauder make any technical or policy decisions in the rulemaking?

A I don't know.

Q Mr. Schmauder did also inform this committee that he, himself, drafted the Waters of the United States guidance and the rule along with Greg Peck of the EPA. In your time with the Corps, is it

common for an attorney with the Office of General Counsel of the Army to draft major rulemaking such as this?

A In the time I've been at headquarters, I have participated in and have also -- my colleagues have been participants in drafting joint rules. And it has not been my experience that folks outside of the technical staff have drafted major portions. But I don't know if it's an uncommon thing for that to occur.

Q Sure. Did you take part in drafting this rule?

A No.

Q Is it, let me back up. Do you know whether Assistant Secretary Darcy has a background in clean water or wetlands jurisdiction issues?

A I don't know.

Q Okay. Did you make any recommendations to Assistant Secretary Darcy that were, either not adopted, in the development of the rule or in the final version of the rule?

A Yes.

Q Do you know offhand what they are? Or is it too long to list?

A There are several recommendations that were made that weren't adopted when she made her ultimate policy decisions.

Q Okay. And what were those decisions or recommendations rather?

A There are quite a few.

Q Okay. Well we'll get into it later. So if we don't hit

any by the end of our questioning, we can recap.

Do you have, or can you provide, an estimate of the time and costs associated with this rulemaking, including the 2010 guidance and 2014 interpretive rule?

Mrs. Bamiduro. Are you asking her time specifically?

BY MS. AIZCORBE:

Q The Corps and Army in general, have you engaged in any computation of time and/or costs associated with --

A I haven't. I don't know if that has been done.

Q Okay. Do you personally believe that the Waters of the United States rule is an improvement from the existing clean water regulatory scheme?

A I think that policy decisions were made. And in my role as the regulatory chief, it's my job to execute those policy decisions.

Q Do you believe that the rule as it was finalized is more efficient than the existing regulatory scheme?

A I think that in my role as regulatory chief, it's my job to develop tools and technologies to make it as efficient and effective as it possibly can be. And that has been my focus since May 28th.

Q Okay.

Mr. McGrath. So you don't have a personal opinion on this?

Ms. Moyer. I think that as a professional, I'm not worried about what my personal feelings and objectives are. I am working and my team has been solely focused on developing efficient and effective methodologies to implement what the policy decisions that were made

are.

BY MS. AIZCORBE:

Q Do you personally believe that the final rule is clear?

A I think that the language in the final rule is written in a clear manner.

Q Okay. Have your staff expressed any concerns that the rule is not an improvement, more efficient, or more clear than existing rules?

A In my discussions with my staff, I conveyed to them very clearly what my headquarters team already knows, which is that Ms. Darcy has the authority to make these policy decisions, and it's our job to lead our field elements in executing those policies decisions.

Q I'm asking about communications that were made from your staff to you. So in those communications, were there any expressions that the final rule was not an improvement, more efficient, or more clear than existing rules?

A I think that it has been recognized that since 2001, we needed some clarity. And we all worked very hard to develop something that would be more clear. And I think that any final rule always has areas that could be made more clear. Because this was a joint effort between Army and EPA, there were compromises that were made. So I think when any group of people engage in the Monday morning quarterbacking, especially a group of technical experts, we're always going to find areas that we would change, we would modify, we would polish.

Q So those communications were made to you?

Ms. Navaro. Can you describe what communications you're referring to?

BY MS. AIZCORBE:

Q The communications that the rule was not an improvement, more efficient, or more clear than existing rules.

If none of those communications were made, then -- if that's your testimony here, then we can move on. Is that what you're saying?

A I would say that in internal discussions in the regulatory community, we've had lots of conversations about the final rule.

Q So you're not answering the question. Is that what I understand?

A I think I've answered the question.

Q Okay. The EPA held numerous outreach meetings with outside groups to discuss the rule during its development. What was the Corps' role in these meetings?

A The Corps participated in about 72 or 73 of those meetings.

Q Did you know about these meetings before they were scheduled?

A Some of them we did. We didn't know about all of them. We participated in as many as we could. We were focused on reviewing comments as they came in. It is not Corps standard procedures to participate in these types of outreach meetings in a rulemaking process.

Q Who from the Army or Corps would participate in these outreach meetings that would be standard procedure? Or are you saying

in a Corps rulemaking, nobody from Army or Corps would be involved in an outreach meeting?

A I'm only going to talk about the Corps. I don't know what Army standard procedures are. But when the Corps' Regulatory Program is participating in either just a Corps rulemaking process or a joint rulemaking process, we aren't doing outreach on the rule.

We put it out for public comment. And the public comments. If people reach out to OMB and say we would like to have a stakeholder meeting, we participate in those meetings. But we aren't actively seeking to have outreach meetings and talking about the rule in that broad sense.

Q So for those meetings that you did participate in, were any policy or technical staff invited to present at these outreach meetings?

A We were invited to answer questions. And that was the role that we had in the ones that we participated in.

Q And I'm sorry if you already answered this but did individuals from the executive office of the President attend these outreach meetings?

A I don't recall. And I wasn't the one who was participating in those. That was my technical staff. That was Stacey Jensen who was typically there. And Meg Gaffney-Smith participated in some of them as well. That was when we were transitioning between her being chief and my being chief.

Q So which outside groups, if you recall, did you meet with?

A And as I said, I didn't participate in those. So --

Q So you did not participate in any outreach meetings?

A Right. Not while the rule was out for comment, no.

Q Outside of when the rule was out for comment?

A I've participated in some since the rule has been finalized. And in those, I don't recall that there was anybody from the executive office of the President participating.

Q What about before the rule was put out for public comment, did you engage in any or were you participating in any outreach meetings before?

A No. I did not. That was when I wasn't chief and I was deputy. There's a n awkward transition period there.

Q I understand. Are you aware that any outreach meetings took place, even though you weren't in your current role, are you aware of any outreach meetings that took place before the public comment period?

A I'm not aware.

Q Okay. Was anyone from the Corps ever dis-invited from the outreach meetings?

A I don't know.

Q Do you recall a meeting with any Hill delegations?

A I know that they occurred. The Corps wasn't part of those meetings. And how I know they occur is we, the Corps, would be at meetings at EPA or waiting for EPA and Mr. Schmauder to show up for meetings in our office. And Mr. Schmauder and Mr. Peck would walk in

and say we just returned from a meeting on the Hill.

Q Okay. So no Corps Regulatory Program staff were ever invited to those meetings?

A To the best of my knowledge, no. I wasn't invited. And my technical staff weren't invited in the time I was chief. Meg may have some different information that I am not aware of.

Q Okay. Do you know whether outreach meetings were included in the administrative record for the rule?

A I know the numbers of them were. I don't know if the specific list of the outreach meetings were.

Q Were minutes of all meetings to discuss the rule recorded?

A I don't believe the minutes were. But I'm not certain.

Q Okay. Did anyone from the Army or Corps collect comments or recommendations from these outreach meetings?

A The Corps did not from the ones that we participated in.

Q And you don't know whether the Army did?

A I don't know.

Q Okay.

Mr. McGrath. One question as to the 72, 73 meetings. Were these a whole host of different types of groups? Were they certain State stakeholders? Outside groups? Congressional delegations? Do you have an idea of what types of groups they were?

Ms. Moyer. To the best of my recollection, it was a broad sweep. So it was industry groups. It was some environmental groups. I don't recall any congressional delegation groups. Some of them were groups

that represented some tribal industry groups.

So they were kind of a conglomeration of different types of entities. And we tried to participate in the ones that seemed to be the most meaningful to the issues that were coming up most frequently in the comments that we were reviewing from the docket.

Mr. McGrath. And that was usually Stacey Jensen and Meg Gaffney-Smith that did that.

Ms. Moyer. Yes.

Mr. McGrath. Okay. Thank you.

BY MS. AIZCORBE:

Q Regarding comments received during the comment period for the proposed rule, we understand a team of Corps staff were brought in to review and evaluate these comments?

A Yes.

Q Where did these additional Corps staff come from?

A They came from district offices, so they're regulatory project managers from districts.

Q And is that a common practice to bring in more staff to evaluate?

A Yes.

Q Okay. Who made that decision to bring extra staff in?

A I did.

Q Okay. Do these staff then have expertise or prior involvement in clean water or in clean water rulemaking?

A They have expertise specifically in jurisdiction, not in

rulemaking.

Q Okay. When did you begin reviewing the public comments received during that period?

A In November.

Q November of?

A November of 2014.

Q 2014. And it is this team who was brought in who initiated that review?

A Yes.

Q Was there anybody else within the Regulatory Program at headquarters who engaged in the review of the comments?

A Stacey.

Q Stacey. Did the EPA also review the public comments?

A I don't know. I believe that they, not in that timeframe, I don't believe. But I really can't speculate when they were reviewing them, or how they were going about that.

Q Did you engage in any communications with EPA about the public comments?

A I spoke with Russ Kaiser, who is the chief of their Wetlands and Waterways Regulatory Section. I think that's the name of it. And they, to the best of my, understanding, employed a contractor to sort the comments into categories. And I believe that contractor also then prepared summaries of the comments in those categories.

Q Were you provided any documents from the EPA about these? Or were you provided these summaries from the EPA?

A I think the team was. But my team was charged with reading the comment, the substantive comment letters, so those 20,000, 21,000 comments that we call unique, so the ones that were not the form letters, the chunky ones.

Q Right.

A That's what I call them.

Q Okay. After the Corps review, did your staff then summarize --

A Yes.

Q -- these comments? Were those summaries given to anybody within the Army's office?

A We spoke with Ms. Darcy and Craig about our comment summaries.

Mr. McGrath. Quickly about that contractor, do you happen to know who the contractor was, who did this?

Ms. Moyer. I can't recall. I know I have it somewhere. But I can't recall who the contractor was.

BY MS. AIZCORBE:

Q Did the Corps also share their own summaries of the comments with the EPA?

A We discussed it with them. I wasn't there, I couldn't make the meeting. It was discussed with EPA, with Russ and his supervisor, John Goodin.

Q Did any deliverables or action items come out of either the meeting with Mr. Schmauder and Ms. Darcy or the meeting with the EPA

about these comments?

A No.

Q To your knowledge, was any action taken by the Corps after submitting these recommendations to Ms. Darcy and Mr. Schmauder about the public comments and how they would be incorporated into the final rule?

A We were given no action items. I will say that the comments were informative and informed our comments back on versions of the preamble and versions of the rule text.

Q Okay. Were you given any indication by anyone in the Army's office or EPA, that EPA was incorporating the comments into the final rule?

A It was frequently communicated to me, by Mr. Schmauder and certainly in the occasions that we spoke with Ms. Darcy that it was extraordinarily important to Ms. Darcy and Ms. McCarthy that public comments were considered, and they would be reflected in the final rule.

Q Okay. But nothing about which comments or what subjects specifically were going to be adopted or were not going to be adopted?

A One that was frequently talked about was that the public comments reflected a need for bright-lines. So that was certainly brought up frequently. And I will say that I think that the final rule does reflect bright-lines. So -- I'll just end there.

Q Okay. Do you know when the EPA or Army began drafting the final rule?

A No. I don't.

Q Did the EPA finish drafting the final rule before receiving the Army Corps' summarizations or recommendations regarding the public comments that were received?

A I don't know.

Q Were the Corps' recommendations incorporated ultimately into the final rule?

A Which recommendations?

Q The summaries that the technical staff and the staff who you pulled in to make these or to review the comments and to make the summarizations of the public comments.

Ms. Navaro. Just to clarify, I don't think she said that those were recommendations. She said they were summaries of public comments.

Ms. Moyer. And they informed our ultimate -- they didn't specifically inform every single recommendation because we also received comments from our 38 district offices, recommendations from our Engineer Research and Development Center, our Institute for Water Resources on the body of the draft preamble, on the draft rule, several rounds.

So it was the review of the public comments, it was the review of the preamble, it was the review of the draft rule by many people that informed our recommendations on the rule text.

BY MS. AIZCORBE:

Q So the recommendations then, that we're speaking of, were those recommendations incorporated into the final rule?

A Not all of them, no.

Q Which recommendations were not incorporated?

A So there were several of them. I know you have the memos. There were several recommendations that were made that were not incorporated.

Q Okay. So you can't list them for us?

A If I had it in front of me, we could go through them in detail.

Q Okay. Were you given any reason as to why those recommendations were not incorporated?

A No.

Q Was recirculating the rule for a second round of public comment ever discussed after significant changes were made to the draft?

A Not with me, no.

Q Okay.

A And I have to say, I don't think it -- it wouldn't need to be discussed with me.

Q Are you aware that it was discussed at all with anybody else?

A I think that, if my recollection is serving me, we were told that it had been discussed and it was decided that it wouldn't be recirculated.

Q Okay. Do you recall who you were told by?

A I don't. But there was a lot that was going on.

Q The final rule was sent to OIRA for final interagency review

a mere 5 months after the public comment period closed. It took the Corps 8 months to read, review, and respond to the 2,000 comments received for the 2012 Nationwide Permit Program.

How could EPA and the Corps in this case have read, reviewed, analyzed, and incorporated over 1.1 million, including the 20,000 unique comments that you referenced earlier, into the final WOTUS rule in such a short period of time?

A And I think that that's very challenging. And I would say that that's why I brought in additional staff to review them. And we prepared comment summaries.

Q Were any additional staff brought in for the 2012 Nationwide Permit Rule?

A Yes. We always bring in extra staff.

Q So was the number of extra staff that you brought in for this rule significantly more than the 2012 Nationwide Permit Rule?

A It was about equivalent.

Q Equivalent?

A Yes.

Q So you were essentially doing that magnitude more of review -- because we're talking about 2,000 comments versus 20,000 comments --

A Uh-huh.

Q -- with the same amount of staff?

A Right.

Q Okay. Do you have any indication as to why the EPA and Army

were in such a rush to finish this rulemaking?

Mrs. Bamiduro. Did she characterize it as a rush?

Mr. McGrath. She can answer the question.

Ms. Aizcorbe. You can address this in your hour.

Mrs. Bamiduro. You're putting words in the witness' mouth.

Ms. Aizcorbe. You can address in your hour.

BY MS. AIZCORBE:

Q Do you have any indication as to why the EPA and Army were in such a rush to finish this rulemaking, one which had suffered so many deficiencies and so important that they, themselves, consider it a generational rule?

A I was not part of developing the timeline. And what we did was to deliver technical information to inform decisionmakers.

Q Were you told in any way that there was a certain deadline by which the rule needed to be finished?

A I wasn't told a specific deadline. I was told interim milestones. And I worked with my staff to provide the most comprehensive technical information to our decisionmaker as possible within that timeframe.

Mr. McGrath. Do you know if a timeline existed somewhere as to getting this rule finalized? You're talking about getting interim deadlines. But you mentioned a timeline that was longer. Do you know if there's a document or there was a timeline put together for getting this rule out?

Ms. Moyer. I don't know other -- I mean, I put an internal

timeline together to hit milestones for delivery. So you may see a timeline. And that's when I learned how to make a Gantt chart. And I feel very proud of myself because I had never made one before. But I wasn't shooting for a timeline that I was told was a do-or-die timeline. I certainly heard others speak of this will be done in early spring. So I knew that that was, early spring 2015.

I had heard an earlier timeframe prior to that which was, you know, late winter. And I was understanding that that was the January, February timeframe. So I didn't have a hard and fast date that this would be done by X date in whatever year. But I knew that there was a sense of urgency. So that's what was driving my bringing on additional staff to make sure that the technical information that we were providing to our decisionmaker was as robust and as thoughtful as it possibly could be.

Mr. McGrath. Who expressed that sense of urgency to you?

Ms. Moyer. I was hearing that from Craig Schmauder.

Ms. Aizcorbe. Were you given any timeline for when the review of the comments needed to be concluded?

Ms. Moyer. At that point in time, why I brought the staff in when I did is that's when I was hearing early 2015 was what we were shooting for.

Ms. Navaro. Can I just ask who just joined us?

Mr. Hambleton. Ryan Hambleton with majority staff.

BY MS. AIZCORBE:

Q And so when you say early 2015, is that with regard to when

the comment review period needed to be finished or when you were shooting to finalize the rule?

A I understood that in early 2015, a draft final rule was going to be delivered to OMB.

Q Okay. And were you aware of any efforts to draft the final rule before you had engaged in the review of the public comments?

A There were conversations among, it was called the Team of eight which involved, which involved folks from EPA, Mr. Schmauder, and some of us from the Corps about how the rule was going to be drafted with its preamble, if there wasn't this robust analysis of comments.

Because when the Corps drafts a rule and a draft final rule, we address the comments in the preamble. And there seemed to be a thought that the comments could be addressed while the draft final rule was in interagency vetting. And so we had a lot of conversations about the approach to this. Because from the Corps' standpoint, at least with my experience in rulemaking, those comments needed to be addressed in the preamble.

Q And the preamble is a part of the product that is going through interagency review?

A That was my experience. EPA had a different experience, and EPA and Army were comfortable with addressing them during the interagency vetting. So ultimately that was the decision that was made and with some summary information about the comments in the preamble.

And so that was the process that was followed with a very detailed response to comment included in the final rule package.

Q So I understand, the package that entered the final interagency review included a preamble, but it only had a summary of the public comments there?

A Summary statements about comments that informed the decisions that were reflected in the draft final rule.

Q And the clarifying or adding detail to the comment summaries in the preamble that you were discussing earlier, that happened during the interagency review?

A The very detailed, and I think it's, if I'm remembering right, it's about 13,000 pages, where every single public comment is responded to, is part of the final rule package.

Q And in your experience, that would have happened before the rule --

A How the Corps does it, we respond to the comments in the preamble.

Q Before the rule enters into the interagency review?

A For the final rule, yes.

Q Okay.

Mr. McGrath. Could you just step back for one second. You talked about this team of eight. That's yourself, Mr. Schmauder, and who would the other six people be?

Ms. Moyer. So it was me, Mr. Schmauder, Jim Hennon, who was the chief of Operations and Regulatory at the time who is now retired, Chip Smith, John Goodin, oh, boy --

Mr. McGrath. We're up to five.

Ms. Moyer. It's really bad. Who else was on this team? I need three more.

BY MS. AIZCORBE:

Q Was Meg Gaffney-Smith part of it?

A No.

Q David Cooper?

A Lance Wood, Gautam Srinivasan.

Q Can you provide the name of that --

A I absolutely can. I'm sorry, my brain is very full.

Q That's fine. We discussed the disparity in the number between the comments received for the Nationwide Permit Program and the WOTUS being 2,000 versus 20,000 and that you executed your review of the WOTUS comments in an even shorter period of time.

We discussed a little bit about the rush and the fact that there was a set deadline, that there was a target, anyway, of when this rule was going to be finalized or delivered for final interagency review. Do you personally believe that politics played a role in the rulemaking timeline?

A I can't say definitively that it did, but it appears that it did.

Q Okay. We would like to understand a bit more about the science underlying the guidance documents as well as the proposed and final rule. According to EPA's fact sheet on the Waters of the United States rule, 117 million Americans have not had and will continue to not have clean water without the WOTUS rule. Do you know where this

number came from?

A No.

Q Was this number developed by the Corps?

A No.

Q Had you ever engaged in a discussion about this number with anybody?

A I have not, no.

Q Had you heard of this number before?

A Yes.

Q Okay. Committee staff were told that the 2008 Clean Water Guidance implementing the Rapanos Decision was rewritten in 2010 to reflect new science from other reports. Are you aware of what these other reports are?

A No. And I'm a little confused by that statement.

Q Okay. So we are aware of a 2008 guidance implementing the Clean Water Act. And then that guidance was rewritten in 2010. And when committee staff asked Mr. Schmauder in his briefing what the reason was for redrafting in 2010, he said that it was because there were other reports with new science, they had decided that the guidance needed to be rewritten. So I'm just wondering if you were aware of what those other reports were?

A I'm not sure what he was referring to. And I'm wondering if the 2010 guidance, is that the draft guidance that was put out for review? I'm just confused by --

Q I believe so, yes. In 2011, I think it went to OMB.

A Okay. So, it was the first step of this process that we've been in. Okay.

Q Right. So now that you understand what that is, are you aware of the science?

A I'm not aware of the report, the specific reports he may have been referring to.

Q Okay. Or the general new science that was developed between 2008 and 2010?

A I'm not aware of specifically what he's referring to. I know that from 2001 through time, there has been new science or at least new published science talking about the interaction of different aquatic resources on the landscape.

A lot of that was referenced in the connectivity report. And I know there was a desire to provide clarity. And that has been this longstanding effort that the agencies have been engaged in that started with the guidance and went to a rule, went back to the guidance, and has now been finalized in this rule.

Q Okay. And you mentioned the connectivity report. We understand that a lot of this new science was accepted or used in this connectivity report which was ultimately used as a basis of the rule. Are you aware of when the connectivity report was initiated?

A I'm not aware of the specific timeframe, no.

Q Did the Corps request or initiate the report?

A No.

Q Are you aware of when the connectivity report was finalized?

A That was in the November timeframe of last year I believe.

Q Did the Army or Corps play any part in its development?

A On the draft connectivity report, we provided comments. But it is an EPA product.

Q So the EPA initiated the report?

A Yes.

Q Were the Corps' recommendations or comments, as you said, accepted into the final version of the connectivity report?

A Some of them were.

Q Were you given any answers as to why those comments that were not accepted, were not accepted in the final report?

A It was our scientists at our lab were in a dialogue with some of the EPA scientists. But, ultimately, it was an EPA product and rightly so. They had complete control of that through their Science Advisory Board and their Office of Research and Development.

Q Okay. Are you aware of whether the Corps' Engineer Research and Development Center reviewed or made recommendations for different or additional science to support the policy decisions that were ultimately in the rule?

A The recommendations I'm aware of that ERDC conveyed were to broaden the included science to support where the direction of the rule was headed in terms of supporting the connectivity between the tributaries and some adjacent wetlands and some more isolated water bodies.

Q Okay. Was the science broadened in the final report per

ERDC's recommendations?

A I think not to the extent that we would have liked it to have been.

Q Okay. Did the Army Corps conduct new science on significant nexus or how to determine the impacts to physical, biological, or chemical integrity of waters?

A No. No new science.

Q Did the Corps conduct new science on the five types of water bodies the EPA determined to be similarly situated in the rule?

A No.

Q Did you ever discuss conducting new science with respect to either of these matters?

A No, we did not discuss conducting new science while we were working on developing the final rule.

Q Okay. In a letter to the Senate Committee on Environment and Public Works, Secretary Darcy admitted that the Waters of the United States rule is not based on case-specific jurisdictional determinations of the Corps, even though the preamble to the rule makes that claim. Were you ever given the opportunity to weigh in on those items in the preamble?

A I don't understand. Which items in the preamble?

Q We're talking about the case-specific JDs, that the preamble of the rule makes the claim that these case-specific JDs came from the Corps. Were you ever given an opportunity or did you ever discuss this claim in the preamble of the rule?

A I'm having a hard time parsing out what exactly you're asking me.

Q Okay. Did you ever discuss jurisdictional determinations with respect to the language that was in the preamble of the rule?

A We discussed case-specific JDs with our EPA colleagues in the course of developing the economic analysis. Specific to the preamble language, we didn't write the preamble at the Corps. So I, that's why I'm having a hard time answering your question.

Q Sure.

A I'm not --

Mr. McGrath. Can you explain what the case-specific jurisdictional determinations, what were they?

Ms. Moyer. The ones that were discussed associated with the economic analysis were associated with isolated waters JDs. And the Corps looked at a body of them. And EPA looked at a body of JDs. And the conclusions that appear to be drawn in the preamble aren't really associated with the JDs that were looked at associated with the economic analysis.

Mr. McGrath. Okay. So what was looked at for the economic analysis specifically are not the same as what you would see in the preamble.

Ms. Moyer. Right.

Mr. McGrath. Okay. Okay.

Ms. Aizcorbe. Do you know why the EPA used a different set of JDs in the preamble?

Ms. Moyer. No.

Mr. McGrath. I want to jump back to the guidance we discussed a little bit earlier.

Ms. Navaro. When you're talking about guidance, can you just clarify like the year? And if it you have the document, that would be useful.

Mr. McGrath. I don't know that I have that document.

Ms. Aizcorbe. We can get it.

Mr. McGrath. We can actually get those.

BY MR. MCGRATH:

Q In 2008, did the Corps prepare any guidance documents in implementing the Rapanos Supreme Court decision?

A Yes.

Q What was your role in preparing that guidance?

A I didn't have a direct role. I had a review role. But I wasn't directly involved in preparing it.

Q Who were the main drafters of that?

A The chief of Regulatory at that point in time was Mark Sudol. And, interestingly enough, Russ Kaiser worked for Corps headquarters at that point. He now works for EPA.

Q Okay. And then was there a new guidance document drafted in 2010 to update and change what was in the 2008 guidance, draft document?

A That was ultimately the draft guidance document that was circulated for public comment in 2011 I believe.

Q Okay. Did you have a role in preparing that guidance document?

A Again, I didn't help prepare it. But I was in a review role.

Ms. Aizcorbe. Who did prepare it?

Ms. Moyer. That would have been David Olson and Meg Gaffney-Smith.

Mr. McGrath. Okay. What would you say -- I don't want to get into that. I have one other very aside question. We're getting close to the end of our hour here. So I have one more question. And then we'll probably go off the record at that point. Are you aware of the EPA working with outside groups to solicit comments for the rulemaking?

Ms. Moyer. I was aware, I was made aware after -- are you talking about the Thunderclap thing?

Mr. McGrath. Correct.

Mrs. Bamiduro. This seems to be outside the scope of what you asked her to come for. According to your email, you were going to ask her about her involvement in the rulemaking. This seems far afield --

Ms. Aizcorbe. That is not what I asked. But we are using up the last few minutes of our time. So I want to move forward.

Mrs. Bamiduro. Let's go off the record for a moment to discuss this.

Mr. McGrath. Let's go off the record.

Ms. Aizcorbe. That's fine.

[Discussion off the record.]

RPTR GENEUS

EDTR HUMKE

[11:05 a.m.]

BY MR. MCGRATH:

Q So as we are talking about your understanding of this so called thunderclap solicitation of comments, were you aware of this at the time that it was being done?

A I wasn't aware at the time. I became aware after, and this was after the rule was finalized and there were requests from Army for us to tweet and put stuff on our headquarters' Facebook page, and it was then that Stacy Jensen mentioned that there had been a request from EPA for us to participate in the thunderclap. And that's when I became aware that this thunderclap effort had happened.

Q Happened?

A Happened. And I didn't know what thunderclap was, so it was an education for me.

Q So Stacy Jensen would have been aware earlier than you were, because you were informed by her?

A Correct.

Q Okay.

A Correct.

BY MS. AIZCORBE:

Q And to your knowledge, did you weigh in on, or participate in any of those efforts?

A No, we did not.

Q Okay.

Mr. McGrath. That's my only question. We can go back off the record.

Ms. Navaro. So can we take a quick break?

Ms. Aizcorbe. Yeah, absolutely.

[Recess.]

Ms. Fraser. It's now 11:19 on the clock. Ready to go forth?

Ms. Moyer, once again, my name is Beverly Britton Fraser. I work with Mr. Cummings' office. I'm the counsel on the committee. Nice to meet you.

Ms. Moyer. You, too.

Ms. Fraser. I want to step back and talk to you -- can everybody hear me?

Ms. Aizcorbe. Now, yes.

Ms. Fraser. Okay.

EXAMINATION

BY MS. FRASER:

Q I just want to step back and talk a little bit more about your background before we go forward into some of the statements that you made earlier.

Now, you mentioned that you have been with the Corps of Engineers since when? 1994?

A Yes.

Q And when did you join the regulatory division?

A In 1995 in Baltimore, in November.

Q Okay. Right now in your position, who do you report to?

A Meg Gaffney-Smith.

Q And who does she report to?

A Eddie Belk.

Q And between Miss Gaffney-Smith and Eddie Belk, how many other people are between them and Ms. Darcy?

A That's a good question. So Eddie reports to Steve Stockton, and Ms. Darcy provides oversight to the Corps Civil Works program, and Mr. Stockton is the director of Civil Works. So she provides that policy guidance and oversight to Civil Works. So I don't know who Mr. Stockton's actual supervisor is.

Q Okay. So there are at least four people and perhaps more above him before you get to the assistant secretary level, right?

A I don't know. I don't know what that reporting chain is.

Q Sure.

A I don't know if she has direct supervisory authority over him in any way, but she's providing that policy oversight to all of the Corps Civil Works programs.

Q Okay. So you are the regulatory chief?

A Yes.

Q So how many people report to you?

A I have one direct report, and then I'm the senior rater for six program managers at headquarters.

Q Six program managers at headquarters. Do your

responsibilities extend outside of headquarters?

A No, not my supervise --

Q In terms of supervision?

A No.

Q Okay. Now, you mention that, you know, you do the day-to-day regulatory work. Could you describe what that entails on a day-to-day basis?

A Certainly. I am very focused on providing support to our districts and divisions in terms of interpretations of our regulations. So, for example, regulatory chiefs in our 38 district offices frequently call me when they have a challenging permit application that they are facing when they have questions of regulation and policy. They will call to say, am I facing this challenge appropriately? Am I interpreting this correctly? I interact with our Federal partners regularly.

So I meet with National Marine Fisheries Service, with EPA, with Fish and Wildlife Service, to work out problematic solutions so that we can be as efficient and effective as possible while also protecting the resources that we're charged to protect.

I develop our budget proposals to move forward and ensure that our districts are appropriately executing their budgets and delivering fair and balanced decisions to the regulated public.

I work with our information technology people to make sure that our Web site has clear information on it. I'm working with our program managers at headquarters as they are overseeing the development of the

training program for our 1,251 regulators.

Q And just let me stop --

A Sure.

Q When you say regulators, you mean these are Corps employees, or do the regulators have a particular function? Is that --

A Yes. Thank you for asking that. These are the employees in Corps district offices that work in the Regulatory Program reviewing permit applications, doing compliance checks on issued permits, working on enforcement activities for activities that someone has done without getting a permit. So then when I refer to regulators, it is those Corps employees that are working within the Regulatory Program in the 38 district offices.

Q And in the 38 district offices besides people in the Regulatory Program, there are hundreds of others that do other things, right?

A Yes.

Q In the Corps?

A Yes.

Q And so do the district offices that -- you mention members of the 38 district offices sometimes call in to you to ask you for interpretation and so on and so forth. Do they ever perform any field functions that feed information to your office? For example, do they perform any, like, significant nexus determinations? Do they do JDs? Do they do any of those things, or --

A That's where all of the work is done.

Q All of the work is done?

A Yes, all the execution of the Regulatory Program is done in the 38 district offices. So that's where the permit application evaluations are done, where the jurisdictional determinations are done. They are done in the district offices.

Q And so headquarters' role in those is just what, an oversight to make sure that those things on done in the confines of the law?

A Yes.

Q And you aggregate the information that they have?

A Yes.

Q Okay. So let's talk a little bit about your involvement in the waters rulemaking. When did you first become involved in the waters rulemaking?

A It's a complicated answer. I, as deputy chief, was reviewing a lot of information and a lot of the draft documents and presentation material that was being developed while the guidance effort was going on in the 2010, 2011 timeframe.

Q Okay.

A I was acting chief from June of 2012 to end of June 2013. So I was engaged at that point in time as acting chief in briefings, in inter-agency interactions with EPA, and then I became much more engaged in the July 2014 timeframe when I became chief of the Regulatory Program at headquarters.

Q Okay. And your position as acting chief, had somebody just

vacated that position, is that why you were acting?

A Meg Gaffney-Smith went on a developmental assignment into the position she currently holds now, and so I then stepped into her position.

Q Okay. So you mentioned that while you were acting and certainly, in your role as chief, you worked with EPA?

A Yes.

Q Could you tell us a little bit about what your work with EPA looks like on a day-to-day basis?

A Certainly. We have conversations about the execution of the Clean Water Act 404 program, so I have frequent conversations with Russ Kaiser, who is the head of -- and I always forget the proper name of the office, the wetlands and --

Q OWOW?

A He's not the head of OWOW, but he's a head of a branch within OWOW. And also with John Goodin, who is his director. Whether those conversations are specific to the Clean Water rule in the timeframe of November 2014 to April of 2015, Russ and I spoke probably not every day, but, you know, four or five times a week about the rulemaking effort. John Goodin and I maybe talked once a week about the rulemaking effort.

Now, on a regular basis, I talk to Russ Kaiser about challenging jurisdictional determinations around the country. We talk about some very high-profile permit actions where an EPA region and a Corps district may not be seeing eye to eye on a specific issue. We also

talk about overall program implementation, what can we work together better on to make things more efficient, what can we work together on to protect the aquatic environment more effectively. So conversations like that is how I partnered with the EPA.

Q Okay. So pretty much every day or on average daily communication?

A I would say it would be uncommon for us not to talk at least every other day.

Q Okay. And outside of Mr. Kaiser and Mr. Goodin, do you interact with anyone else in EPA who has been working on the waters rule?

A It's not common. On an infrequent basis, Greg Peck will send me an email and ask me for information, but it's uncommon for me to interact regularly, with other folks. Sometimes some of Russ' staff may ask for information or want information. Russ' staff interact frequently with members of my team.

Q Okay. And you mention that you have, I think, six people that you said that report to you?

A Yes. I have a deputy, and then I have six program managers.

Q And so would Mr. Kaiser and Mr. Goodin also interact with them, or is he principally communicating through you?

A Sometimes Russ will reach directly to my teammates, my team members, but he primarily interacts with them through me.

Q And, by the way, I'm just curious, what is your background in terms of, you know -- what is your experience

with -- educationally?

A I have a bachelor's degree in biology and a master's degree in botany.

Q In botany. Okay.

Now, in the conversations that you've had with Mr. Kaiser and Mr. Goodin, and certainly among your team, did you talk about, you know, data that was going to be used to support the rule? What did you do, interpret data? What kinds of things did you talk about that impacted the rule on a day-to-day basis?

A We spoke about data and what data would be needed to update the economic analysis. There's an economic analysis done for the guidance. We talked a lot about how to update that economic analysis using the revised rule, and knowing that the rule was being revised, at what point in time were we going to land on the version of that to update on the economic analysis.

Q And in terms of the data, was it something that the Corps was providing? Where was that coming from?

A The data for the economic analysis was, EPA requested data from the Corps. For a lot of that it was mitigation data, it was impact data that the Corps was providing. And then data on -- and this was some of what we got into just a little while ago, was from an analysis of existing jurisdictional determinations that had been completed on isolated waters.

We had agreed between EPA and the Corps to look at a body of jurisdictional determinations. EPA was looking at some. We were

looking at some.

Q Where were they getting theirs from?

A We were both getting them from jurisdictional determinations that were coordinated among our agencies.

Q Okay.

A So we were doing a stratified random sample of these isolated waters, JDs from a discrete time period. We were going to look at ours, they were going to look at theirs using an agreed-upon methodology to determine the change in jurisdiction --

Q I see.

A -- we were going to come up with an answer, they were going to come up with an answer to see if we came up with the same answer for the change in jurisdiction.

Q And did EPA often do independent jurisdictional determinations side by side with you guys? Maybe not necessarily on the same project, but did they always do those?

A No. No. This was just an exercise --

Q Just an exercise?

A -- to look at the rule to sort out what the change in jurisdiction might be with the revised rule on these specific types of water bodies. This was just to inform the economic analysis.

Q Okay.

A So that was the data question.

Q Right.

A I was just trying to answer that, where the data was coming

from.

Q I appreciate it. Okay. Did your conversations with your EPA counterparts also include, you know, gathering information, and what else did you talk about?

A Oh, we talked about the comments and how we were going to approach reviewing the unique comments, and then the subset of substantive comments within the unique comments, so the non-form-letter comments, how were we going to go about that, and then how were we going to talk about the results of all of that. So that was some of the conversation as well.

Q Okay. Let's talk about your counterparts in the Army. Who in the Army did you work with, with respect to this rulemaking?

A Our primary contact within Ms. Darcy's office was Chip Smith.

Q Chip Smith?

A Yes.

Q Okay.

A And, then, certainly Mr. Schmauder was involved in all of this effort as well.

Q So essentially two people?

A Right. Our day-to-day contact, however, is Chip Smith. He is the assistant for regulatory environment and travel affairs, and he is who we coordinate with on regulatory issues on a day-to-day basis, all regulatory issues.

Q Do you have any sense of who Chip's staff was, or maybe

Mr. Schmauder's staff, like, how many people they were working with as they were, you know, relating information to you, and among you, and with the EPA?

A Chip doesn't have any staff. We provide -- we, being regulatory, provide him with a detailee, a professional developmental assignment that we pull from the field to help him.

Q Okay.

A I am not familiar with who Craig has as staff, who Mr. Schmauder has as staff, to help him regularly. So I know some of the names are familiar, but I don't know on a regular basis who he's able to pull from.

Q And so just a few minutes ago, when you were talking about the team of eight, these were some of the people that comprised the team of eight?

A Right. Craig and Chip were on that team of eight.

Q And you also mentioned another gentleman from EPA, Gautam Srinivasan?

A Srinivasan, yes.

Q I'm really bad with names.

A I know.

Ms. Aizcorbe. Is it possible to get a spelling of that?

Ms. Navaro. I could spell Gautam. I'm not sure I can spell his last name.

Ms. Aizcorbe. I am asking for the reporter.

Ms. Fraser. Okay.

BY MS. FRASER:

Q And how often would you interact with those people, the team of eight?

A Sure. The team of eight was stood up in September of 2014. And we were slated to meet every Tuesday, I believe, and we did meet every Tuesday until the beginning of November, and then we stopped meeting.

Mrs. Bamiduro. 2014?

Ms. Moyer. 2014, right. And then we stopped meeting, and then we -- until, I would say, mid-January, and then we had sporadic phone calls after mid-January.

BY MS. FRASER:

Q So from November until about January you had a good two solid months of --

A Of no meetings.

Q Oh, so that's when you stopped meeting?

A We stopped meeting after the 6th of November. There were no meetings, then, until about the middle of January.

Q Okay. What's the reason for that?

A I don't know.

Q Okay.

A I don't know. The meetings just would be canceled every week.

Q I see. Middle of January. And then you picked up the meetings again?

A There would be phone calls. They were face to face before, and then there were sporadic phone calls. And in that timeframe, I would say towards the end of January, early February is when Mr. Schmauder shared with us a draft of the draft final rule --

Q Okay.

A -- that had been developed. I would assume in that time period. I'm not sure when it was developed.

Q So just stepping back a bit, the purpose of assigning the team of eight was for what, exactly?

A It was my understanding -- and this was communicated to us by Mr. Schmauder and Mr. Peck -- was that this team of eight was going to discuss technical issues and concerns and considerations that then would be raised to the policymakers. And we would try to come to a series of options and recommendations that would be the minimal number that would, then, be considered by the policymakers themselves for decision into the draft final rule. So we would resolve as much of the technical issues as we possibly could in this team of eight.

Q Okay. And as far as you can tell, did you?

A I think that it would be fair for me to say that in our initial conversations we had very robust conversations about what concerns had been raised by the public comments that we had already seen and the ones that continued to come in. We were talking about them.

A series of option papers were being developed both by EPA and by the Corps, and we were talking about them. We clearly were having

necessary and robust disagreements at that inter-agency table as you would in the development of a final rule --

Q Right.

A I would say we were getting to the point where we were going to start to resolve some of them, and we stopped meeting. So I think we had resolved the low-hanging fruit we had resolved, and we were putting some fine points on the issues that we really needed to start the work.

Q Right.

A So --

Q And so you mentioned option papers being developed by both sides. Were you writing any of those, or were other people charged with writing those?

A No. I would characterize it that Lance Wood and I were writing together the Corps' option papers. And we had split up among the Corps and EPA the issues that we were each writing on.

Q Okay. And you exchanged those and discussed those at the meetings, those robust meetings?

A -- well, what I would say -- and I'm sorry this gets real confusing -- is that towards the middle of November we had been charged to write the option papers. We sent them forward, and then we just -- we didn't really get to the point where we discussed them at any length.

I think it was very clear to everyone our points of disagreement with one another. And then when we started meeting again was when there

was a draft draft final rule to discuss.

Q And you said that meeting, the set-up meetings, picked back up again sometime after mid-January?

A Right, when there was an actual -- when there was actual rule text to discuss. And it was -- that rule text, I would presume, and I'm speculating when I say this, was developed based on the option papers that we hadn't fully --

Q Discussed --

A -- discussed all the way through. That's from where I sit.

Q So based on the information that you put in your option papers and some of the language that you ultimately saw in the draft proposed final rule, would you say that any of the options that you proposed made its way into any of those drafts?

A I would say that the draft rule text certainly reflected discussion points that had come up among the agencies. I wouldn't say that the points that the Corps was extraordinarily concerned about were reflected in that draft text. But it wasn't a surprise what we saw, but I think that it's fair to say that we were surprised that there was draft rule text when we hadn't completed the conversation, and that we weren't part of drafting the rule text.

Q So who did you understand to draft the rule text? Who was responsible for that?

A I believe EPA drafted the rule text. That's my -- that's what I believe occurred. And we weren't --

Q Do you have any basis for believing it was just them, or

could it just have been someone else?

A I suppose it could have been somebody else. That's a fair statement.

Q And that somebody else could have been from anywhere, right?

A True. That's very true.

Mrs. Bamiduro. Could it have been from the Army?

Ms. Moyer. I don't know.

Mrs. Bamiduro. Is it possible?

Ms. Moyer. Anything is possible, yes.

BY MS. FRASER:

Q So once you started discussing the draft proposed rule text, you said it was a series of phone calls that you had with the EPA?

A Yes. We were primarily on conference calls. In January and February of last year, we had a lot of snow days, and on most of those snow days we were on the phone. And it was Army, EPA, and Corps folks who were on those calls discussing the rule text and potential modifications to the rule text.

Q And, of course, you were part of those phone calls, and you were raising all of your concerns?

A Yes.

Q And how would you say the Army and the EPA responded to those concerns that you raised? Do you think you were taken seriously?

A I think in some sense, yes. I think that one of the primary concerns that we raised was the identification of the A-7 waters, so those were the isolated waters, identifying them by HUC-10s and the

huge list of HUC-10s. That was removed from the rule text. And I think that that was a very positive thing. That was a robust conversation then. And so, in that sense, I think it was a very beneficial conversation that we had on these conference calls.

So, absolutely, I think that the technical conversations in some areas were very beneficial. I think in other areas there was a very dismissive, "we're not talking about this" piece. "We're done with that conversation. We're moving on."

Q And when you say "we," are you talking about both the Army and the EPA? Was that their approach?

A I think that oftentimes there was -- that Mr. Schmauder wanted to understand and he would request from me to explain what my technical concern was, and he would ask EPA to explain their technical concern, and then the discussion would move on.

Q Okay.

A And when there was a desire in the next call to discuss it again, this is my perception -- there was irritation expressed by my colleagues at EPA that it was even coming back again. It's like, we discussed this; we're moving on.

And I believe that resolution wasn't reached on some of those things, and it wasn't communicated to me clearly on those calls that a policy decision had been made, that that particular issue was off the table. And this is myriad issues, that's why I'm not identifying a specific issue.

So, and I will say, when a policy decision is made, a policy

decision is made, and we move on. I don't have a problem with that. But this is kind of how I would characterize those conversations. They were clearly still on the table, because no one had communicated, Ms. Darcy and Ms. McCarthy had made a decision.

Q Right. So at this point you are sort of speculating that there was a policy decision made because they were irritated having to revisit it in the conversation?

A Right, or a policy decision hadn't been made, but there was still irritation that we were still bringing up issues that --

Q Right.

A -- that was no longer a desire to talk about.

Q That hadn't been discussed.

Now, I'm sure that as you were going through this with them, in as much as they were irritated with you, did you find yourself irritated with them as well at some of the points that you were raising?

A I wouldn't say irritation.

Q What would you call it? Disagreement?

A I think that it's fair to have technical disagreements. I think that in the development of any rule, you are always going to have disagreements. I think that it's disappointing when common ground can't be found.

Q Right. And not just in rulemaking, but in life, right?

So I want to talk to you specifically about how the public comments figured into your discussions once the January period, when you started talking about figured into discussions once the discussions resumed

in January.

Tell me how those went. Tell me, what did you see as the trends that were developing in your discussions about what the public comments showed?

A From the analysis that our team had done, we reflected that the substantive public comments, so the -- within the 1,000 -- not 1,000, 1.1 million comments, there were about 21,000 unique comments, and then there was a subset of those, around 2,000 or so, 2,000, 3,000 or so that were truly substantive letters that were more than, you know, one-liners that we analyzed.

And in those, there were percentages that we put into various buckets. So they either dealt with ditches, or they dealt with adjacency, or they dealt with isolated waters. And it's difficult to characterize them, although we did, as being positive or negative or neutral or just providing information.

Q Right.

A And even though we did that characterization, I think it's troubling to just say, okay, of the ditch comments -- these are not the numbers, you know -- X percentage are positive -- so I'm not going to use the numbers -- X percentage are positive, X percentage are negative, because I don't think it's informative. But when we would be specifically talking about those, to generally characterize those as the public wants clarity on ditches, and then to link it to, and this is the clarity they want, was troubling for the Corps. Because that's not necessarily the translation when you read the comments that

the public sent in.

Same thing with the public wants bright-lines. Well, when you read the comments, are these the bright-lines that the public has asked for?

Mrs. Bamiduro. Can I just pause you for a second?

Ms. Moyer. Certainly.

Mrs. Bamiduro. You said something was troubling for the Corps. Or was it troubling for you?

Ms. Moyer. When I say troubling for the Corps, I would say the team that we brought in to analyze these comments and summarize them, when I was providing the draft rule text to them to say, does this capture -- and we broke them into teams. So the folks who read the ditch comments, I said, this is how the ditch language was changed. Does this reflect the comments that the public sent?

So they would read it and say, yes, no, sort of, we're kind of getting there, or you guys are missing the mark. And I would take that back to these calls and say, we're not characterizing or we're not capturing what the public has asked us to do. Or we have -- you've gotten it here, you aren't getting it here. So when I say the Corps, that's what I'm reflecting.

BY MS. FRASER:

Q And thanks for that clarification. In terms of the team, I just want to step back. I know you talked about this a little bit earlier. You mentioned the team that was doing the summarization of the comments consisted of yourself and who else?

A And I wasn't on the team summarizing the comment. It was Stacy Jensen, and then we brought eight people in from various districts.

Q And what were their titles or roles? What roles did they play before you brought them in?

A They were regulatory project managers in the district offices. So they were from all different districts.

Q And there were eight of them?

A Yes.

Q And I think earlier you mentioned that the team took, what, 5 months to go through the comments?

A Yes. And when they returned to -- that was while they were in D.C. When they returned to their offices, we continued to borrow some of their time.

Q And they produced summaries of all of those 20,000 comments with substantive comments within the 5 months?

A Uh-huh. Yes, they did.

Q And were these written summaries?

A They are summaries -- yes. It's not written summaries of each comment letter, but it's overall summaries of buckets of comments. So if there's a -- there are various bucket of comments of ditches and adjacency, and --

Q Right. So some of those summaries would, then, interpret the information they saw in the actual comment and then put it in this document?

A Yes.

Q And those summaries were generated and given to you?

A Yes.

Q Now, as far as you know, the same thing was happening at EPA. Is that right?

A I believe so, by their contractor.

Q So the EPA also had its series of people providing summaries of the same comments that you were looking at?

A I believe so, yes.

Q Did you ever get a chance to look at what those summaries were?

A No.

Q Did you ever discuss it with your counterparts at EPA what was in those summaries?

A No.

Q Do you know who was involved in creating their summaries for them?

A I believe it was their contractor.

Q Contractor. But you don't know for sure?

A I know they had a contractor summarizing the public comments. I know they also had some of their field folks -- some people in from their regional offices. I don't know those individuals' interaction with the contractor.

Q Did you ever discuss with your EPA counterparts what the contents -- what their interpretations or their summaries revealed

about what the public's comments says?

A I didn't have that conversation. Stacy Jensen may have, but I did not.

Q So while you were having conversations with the team of eight on the phone, these didn't come up, these comments, public comments, and whatever trends you were seeing --

A I was raising what our folks were saying, and EPA was suggesting that what they heard in their outreach meetings, and what they were reading in public comments was reflected in the rule. So, yes, we were having that conversation.

Q You were having the conversation. So it appears as though the interpretations of the public comments just fell along different lines from what the Corps summaries were and what the EPA summaries were?

A That may be an accurate statement, and I believe also that one of the key pieces that was brought up was what was heard by EPA in the outreach meetings.

Q What did they say they heard in the outreach meetings with respect to major issues that you saw in the comments? Like, pick one, for example.

A I think bright-lines and a need to do something with ditches.

Q And you mentioned that the Corps didn't do any outreaches as a general course of your work, right?

A I said that we participated --

Q You participated, but you didn't initiate any outreaches?

A Correct.

Q When you say participated in the -- I think you mentioned about 70 -- well, the Corps participated in about 70 outreaches?

A Yes.

Q You mentioned that you personally didn't participate in many of them?

A Correct.

Q Do you have a sense of what your staff member or any of the Corps participants or presenters at these outreach meetings might have heard with respect to those comments?

A I didn't review of any of that, so I can't reflect what they may have heard.

Q But when your staff came back from some of these outreaches, they certainly touched base with you to let you know, you know, what their day was like or what their meeting was like, right?

A I just can't recall that right now.

Q Understood.

BY MS. BAMIDURO:

Q Can I just ask a point of clarification? Are there two teams of eight?

A No.

Q It's just one team of eight?

A Right. There's the inter-agency team of eight and then we had eight people in our detail.

Q So there are two teams of eight?

A Right. Sorry about that. That got confused. There's one that we refer to as the team of eight, and that's the inter-agency team of eight, and then there are detailees, yes.

Q Okay. That is not called the team of eight?

A Yes. Sorry.

Q Got it. So the team of eight, that is the inter-agency folks that were meeting every two weeks and then stopped for a period, and then there were calls to discuss the language of the rule. Is that right?

A Yes.

Q Who put together those eight people?

A It's my understanding that that was a discussion among EPA and Army and that included Ms. Darcy, and I believe she coordinated that with General Peabody and Mr. Stockton who the Corps attendees would be in those meetings.

Q And as a member of the team of eight, did you expect that you would be a final policymaker?

A No.

BY MS. FRASER:

Q Did you expect any of the other members of the team to make final policy decisions?

A No.

Q Was it understood that all of you, as members of the team, would help inform those who would make that final policy decision?

A I'm reflecting on what my thoughts were that that team of eight would do, thinking back to the first meeting. It was conveyed at that first meeting that our job was to develop options and recommendations for the final policymakers.

Mrs. Bamiduro. Options?

Ms. Moyer. Yes.

Mrs. Bamiduro. So was it understood or did you have any expectation that every recommendation that the team of eight made would, in fact, make its way into the final rule?

Ms. Moyer. No.

BY MS. FRASER:

Q Now, earlier you talked about some -- you said you made some recommendations as to what could be included in the rule, and you were pretty strident about certain thoughts. For example, you said that one of the things that made it into the rule was -- let me step back for a second.

You said you didn't make any recommendations but comments, right, as far as recommendation -- as far as the proposed final rule, and that Mr. Schmauder told you that it was important that public comments be considered and respected, right? Is that right?

A Right, Mr. Schmauder conveyed to us that Ms. Darcy felt that it was very important that public comments were considered and included in the final rule, yes.

Q And that one of the frequent comments that the public gave was this bright-line rule, or this need for a bright-line?

A Uh-huh. Yes.

Q And you just mentioned that when your team looked at what that comment was, it didn't necessarily gel with what the language of the final rule said about what that bright-line should be, right?

A That's not what I said. What I said was, as we were going through iterations of the final rule, I would give it to the team to say -- and this was through time. There were lots of versions of the rule through time.

Q Right.

A So I would ground truth it with them to say, how does this version look? How does this version look? How does this version look? So that when I was participating in those team of eight meetings, I could provide that feedback based on the folks that had looked at those public comments.

Ms. Navaro. And not just on the bright-line rule, correct, on the various issues?

Ms. Moyer. Right. Right. Yes.

BY MS. FRASER:

Q I'm interested in knowing, when your team looked at the public comments about this -- I'm sticking with the bright-line issue for the moment. When they looked at the public comments about need for a bright-line, and then you looked at the language that had been presented to your team sometime after January of 2015, what was your team's interpretation of what the bright-lines meant?

A I think that it's fair to say that in many different comment

letters there were requests to define ordinary high-water mark this way, define ditch like this. That would be a very clear definition and would provide clarity. And so to provide a bright-line -- and I didn't read all the comment letters, so I think it would be interesting to know, and I don't know this, if any letter said, please provide us a bright-line.

So I don't know if that was in any specific comment letter, or if that is just a way that we have characterized the request for this extreme clarity in the rule.

So what I would suggest is that my team looked at the bright-lines that were defined in the rule and compared it to the body of comments that they have received to say, well, I had 15 comments that said they wanted this type of clarity, that wanted a definition that reflected this, this, and this, for bed and bank and ordinary high-water mark, and we defined it this way. It's not reflected what they are requesting. So that's kind of the granularity that they were looking at.

Q So it seems that what you are saying is that your team felt that the public was looking more for clarifications on definitions of things?

A Or they may have been looking for a bright-line in terms of adjacency or what have you that was at a different distance threshold than what was in the rule. I mean, a bright-line is a bright-line, whether it's at 50 feet or whether it's at 50,000 feet.

Mrs. Bamiduro. But you said you didn't read the comments, right?

Ms. Moyer. I did not read all of the body of comments. I read a certain subset of comments in each category.

Mrs. Bamiduro. Okay.

BY MS. FRASER:

Q So if you were to -- and we are using this word bright-line because it's shown up in a lot of the discussion about this rule.

A Right.

Q So if you were to interpret what bright-line meant, what I'm getting from you is clearer definitions of various items that are significant in this rule?

A That's one way to interpret it. Another way to interpret it is there needs to be a bright-line between what is jurisdictional and what is not jurisdictional, but there are lots of opinions that have been expressed by commenters about where that line should be.

Q About how many different kinds of opinions would you say have been expressed by where that line should be, about what that line should be?

A I would have to speculate about how many. I mean --

Q So at some point, because we have so many different interpretations of what that line should be, whether it's a linear line, definition line, or something else, at some point someone has to strike what that is? Is that right?

A I believe it should be supported by science, and science doesn't draw a line on the landscape.

Q Setting aside science for a moment, whether or not it's

supported by science, the decision has to be made what the bright-line is, right?

A I think that how we've defined it in the past is that if there is a connection to a water body, a surface connection, or shallow surface connection, that is a different type of bright-line.

Q I know. We're going to get into that a little bit later. Right now, at this moment, but let me just put it this way, at some point Assistant Secretary Darcy and the administrator of the EPA made a decision or came to an agreement on a decision of what the bright-line would be. And in this case, they defined it as a linear bright-line. Is that right?

A That is the decision they made, yes.

Q Would you say that it was within their parameters, as policymakers, to do so?

A Absolutely. They have the policy authority to do that.

Q And would you say they have a right to rely on those people who they employ and who they look to for guidance in making that decision?

A Ms. Darcy was provided the best technical advice that she could be provided, so she made her decision based on that technical advice and potentially a whole lot of other information.

Q That's right. So if the technical advice that she received and decided to use included making a bright-line a line, a literal line, 4,000-foot line, then that's within her right under the scope of her duties to do so, right?

A Absolutely. She has the ultimate policy authority.

BY MS. BAMIDURO:

Q Were you aware of all of the information that Ms. Darcy was provided in her ultimately reaching her decision?

A No. I only know what the Corps of Engineers provided her.

Q Okay. And can I just step back for just a second. So going back to the official team of eight that were having the meetings every Tuesday, I think you said it was?

A I think it was Tuesdays.

Q And then you said they stopped on November 6th; is that right?

A Yes.

Q Are you aware whether inter-agency meetings involving other folks were taking place after November 6th but between January, in the middle of January?

A I'm not aware that they were. I have heard references to them.

Q From whom?

A Mr. Schmauder has referred to meetings that he has with Mr. Peck -- has had with Mr. Peck, but I wasn't there, so it's only what Mr. Schmauder has referred to.

Q And Mr. Schmauder referring those meetings to you, was it for the purpose of discussing the rule?

A That's what he would say.

Q Okay. So you were not privy to the contents of those

meetings?

A Correct.

BY MS. FRASER:

Q Is it possible that besides your office that anyone else in the Corps could be participating in those inter-agency meetings?

A I wouldn't know.

Q So if someone from one of the field offices or a number of people from field offices were tasked with providing information either to the Army or to the secretary, you wouldn't know independently?

A I wouldn't know if they were told not to tell me. I wouldn't imagine that they would be told not to tell me, but if there was some activity going on, I suppose anything is possible. But I have not heard that that has occurred, and I was in close coordination on the rule with the field, so I was seeing their comments on versions of the preamble.

Q And just to make the record clear, when you talk about the Corps' position, are you talking about the position that was developed by you and your team, decisions that were made by you and your team, or are you going beyond yourself and your team and speaking for everyone in the Corps who worked on this rule?

A I'm talking about the Corps' Regulatory Program position when I'm talking about the Corps' position.

Q Regulatory Program?

A Right. Right.

Q How many other programs within the Corps are there beside

yours? I know we mentioned this earlier. I forgot.

A Well, that's a really good question. I can probably speak more handily to the Civil Works program, knowing that we have a military program and real estate and all sorts of things. So we have an environmental restoration program; we have planning; we have engineering and construction. So we have many programs. We have about, I don't know, 32,000, 33,000 employees delivering the work of the Corps of Engineers.

BY MS. BAMIDURO:

Q Going back to the weekly meetings that took place among the team of eight, the information that was discussed in those meetings, do you know what would happen with that information after those meetings? Was it sent up the chain in your respective organizations?

A I know that the Corps participants in those meetings, we would discuss that information, and we would make sure our senior leadership was aware of those discussions. I am not aware of what the other participants in the meetings would do.

Q So was there standard practice for -- this is my word, not yours -- a debrief of your senior management after these weekly meetings?

A No, there was not a standard for that. As we moved further along in the rulemaking process and things were accelerating at points where there was -- it appeared as though Ms. Darcy had a need for information or was going to reach to our senior leaders, or we anticipated that she might, we made sure that they were aware of the

types of discussions that occurred, but there wasn't a standard, you know, we had a call and, you know, the next morning we debriefed the senior leaders.

Q So can you just explain for us how it worked, then? So you had a Tuesday meeting, and then would you go back and talk to -- was it Meg Gaffney-Smith, your direct supervisor?

A No.

Q Would you -- okay.

A And one of the other participants in the team of eight -- as I sit here and talk about it, the names are coming back to me. So it was me, Lance Wood and Jim Hannon, who was the chief of operations and regulatory, so he retired and then it was his replacement, and Eddie Belk. So since Eddie is my supervisor, since he was there, I wouldn't debrief Meg, because her boss was already there.

Q Okay.

A So since Eddie often was participating, and if he wasn't participating, David Cooper was participating, and both of them are senior executive service individuals. One of them was always on, and they would, then, make sure that Mr. Stockton and General Peabody were aware of the discussions points.

So often, but not always, I was in those conversations with Mr. Stockton and General Peabody. Sometimes I was not. So it was a very brief, this is where we are with the Waters of the U.S. rulemaking effort. You know, this is what may happen. Ms. Darcy may ask for information, she may not. There may be a briefing, there may not. So

it was more of a status temperature check, sort of, update. So it wasn't a standard.

Q I guess I'm trying to understand. If there were meetings that were taking place above the level of the folks in the team of eight to discuss what was discussed in the meeting of the team of eight --

A And there weren't at the Corps.

Q Okay. But do you know if that was happening at EPA or at Army?

A I don't know.

Q Okay.

BY MS. FRASER:

Q And do you have any sense of what someone at the level of General Peabody or Mr. Stockton would then do with the information once you briefed them or were part of the conversation in which you made a summary of your team of eight meeting?

A I don't know. I mean, we would have conversations at that point in time, if we were at a point where it appeared as though we needed to engage Ms. Darcy. I don't know, then, if they would have a conversation. I mean, that was way above my head at this point in time or not. I don't know what they would do with it.

Q Did you ever feel a need to, at any time during your discussions either with the team of eight or otherwise, that something was urgent enough that you needed to get to Ms. Darcy's level to deal with a concern that was serious to you?

A I don't know how to answer that one. We were working

in -- within a process, and so -- and I am -- I've worked for the Corps for nearly 23 years, and so I'm a very process oriented person, and I respect the chain of command. And so I had faith in my senior leaders to engage appropriately. So no, I didn't feel the need to --

Q Isolate anything?

A Correct.

RPTR YORK

EDTR SECKMAN

[12:15 p.m.]

Ms. Moyer. So I was raising my issues as the regulatory chief through the appropriate chain of command.

Ms. Fraser. That's it for now. Thank you.

Ms. Aizcorbe. Lunch?

Mr. McGrath. Do you want to try to start at 1 p.m.? Is that enough or --

Ms. Navaro. How about 1:15?

Ms. Aizcorbe. We're good.

[Recess.]

Ms. Aizcorbe. So I guess it is 1:15. So we will begin our hour. Thank you for coming back.

We'd like to start off with addressing what we'll be calling throughout the questioning Peabody memoranda. This was several memoranda that were signed by Major General Peabody, Deputy Commanding General for Civil and Emergency Operations at the Corps, including attachments to these memoranda, which we have here as exhibits, and we'll refer to, like I said, as the Peabody memoranda moving forward. So we'd like to mark one of these. And I can share a copy so that you can follow along. I'm sure you're familiar, but so you have a copy.

Ms. Navaro. Do you have a copy that Milton and I can share?

Ms. Aizcorbe. Sure. Absolutely. We have plenty of copies.

Ms. Navaro. Great. Thanks.

Ms. Aizcorbe. So starting off --

Mrs. Bamiduro. Did we mark it as an exhibit? I'm sorry.

Ms. Aizcorbe. Yes.

Mr. Skladany. Exhibit 1.

Ms. Aizcorbe. It's exhibit 1.

[Moyer Exhibit No. 1
Was marked for identification.]

Ms. Aizcorbe. John, do I need to do anything else?

Mr. Skladany. That's it. Is the sticker on there?

BY MS. AIZCORBE:

Q What led you to execute your April 24, 2015, and May 15, 2015, memoranda included in the Peabody memoranda?

A General Peabody, after discussions with the internal team -- so that would be Lance Wood and I and David Cooper -- requested that I draft the 24 April memo, that Lance would draft his April 24 memo, and that I draft my 15 May memo.

Q So these all came at the request of Major General Peabody?

A Yes.

Q And were those -- the three of you, Lance Wood, David Cooper, and yourself -- were meeting with the Major General Peabody about the concerns that were ultimately included into these memos?

A Yes.

Q Was there any other reason why he asked for them?

A No. Not that I'm aware of. I mean, we were discussing the concerns that we were having in the interagency review process. And we felt that it was as -- we felt as a staff group, and then in discussions with him, that it was necessary to ensure that Ms. Darcy had all of the technical information from the Corps of Engineers as she went into making her final decision.

Q So these memoranda were executed while the interagency review was ongoing?

A Yes.

Q Okay. After issuance of the Peabody memoranda, were you consulted about your memos by any Army or Army Corps staff?

A We weren't -- we did not have specific conversations with

anyone at Army about the contents. I did not have any conversations with anybody at Army about the contents of either one of my memos.

Q Did you have conversations with anybody at Army about the memos in general, not necessarily of the contents?

A No.

Q Of the existence, the issuance? No?

A Not -- not before the rule was finalized.

Q Okay. Did you have any conversations with the EPA about the memos?

A No.

Q Okay. Did you consult with anyone about the Peabody memoranda or their contents after the memoranda were issued? Did you reach out to speak to anybody, any Corps staff, Army staff, EPA staff?

A Not -- we didn't discuss the contents of the memo with Corps staff other than discussing them with General Peabody and Eddie Belk. And so the group of people that knew of the contents of the memo and were aware of the memos and their awareness of them being delivered to Ms. Darcy. So, I mean, we weren't discussing them with staff internal to the Corps.

Q Were you approached by anyone external to the Army or Corps to speak about the memos after their issuance or after their existence became public?

A No. I guess I'm not understanding the question. After they became public?

Q Sure. After the existence of the memoranda became public,

were you approached by anybody external to the Army or Army Corps about the memos?

A No. I haven't been asked to talk about the contents of my memos publicly. Certainty regulatory chiefs have asked: Why did you write them? And I have told them the same reason that I've told you, which is to inform General Peabody so he could provide them to the ultimate decisionmaker.

Q So you had no conversations with Ms. Darcy or Mr. Schmauder about the memos?

A No.

Q Okay. In your May 15 memo, you state that the Corps had, quote, "no role in selecting and analyzing the data and information for the economic analysis of the proposed final rule and no role in actually performing the technical analysis of the rule or in drafting the technical support document."

Did you express these concerns directly to Assistant Secretary Darcy at any point?

A No. We were not provided the technical support document until after it had been sent to OMB as part of the interagency review process.

Mrs. Bamiduro. Can you keep your voice up?

Ms. Moyer. Yes, ma'am.

BY MS. AIZCORBE:

Q Did you express the concerns about not being a part of the development of these documents to Mr. Schmauder at any point?

A Throughout the development of the preamble, when we would receive drafts of the preamble and the preamble referred to the technical support document, we would ask in our interagency discussions: What is the technical support document? Are we going to see a draft of it? So he was aware of that. We asked him that. We asked our EPA -- I asked my EPA counterparts that.

Q So maybe let's go back. When did you know of the existence of the technical support document?

A We knew that it was being developed. We weren't quite sure what it was. But we knew it was being developed when we saw the first version of the preamble that was shared with us. And I'm going to say that was in the March timeframe. I'm not specifically sure of when in that timeframe that was.

Q So it was before the document was sent through interagency review?

A Yes. Yes. We saw several drafts of the preamble.

Q Okay. And is that also when you saw the economic analysis?

A No. We saw the economic analysis -- a draft of the -- a revised draft of the economic analysis after it was provided to OMB within the interagency review process.

Q Okay. So you only saw the revised draft of the economic analysis after the interagency review had begun?

A Yes.

Q Okay.

A Same thing with the technical support document.

Q Okay. So if you hadn't seen it before they entered into the interagency review, does that mean that the Corps was not involved in their drafting?

A Correct.

Q Were you given any opportunity to weigh in on aspects of either the technical support document or the economic analysis before they were included in the final draft version?

A Initially there's -- I have to deal with them separately.

Q Okay.

A On the economic analysis back in the November, December timeframe --

Q And that's of 20 --

A Of 2014.

Q -- 14, just to be clear. Okay.

A We were working collaboratively with EPA on methods to update the economic analysis. We were having conversations on how to best gather data and analyze it to determine how -- the difference in jurisdiction of existing practices and -- existing then practices and then under the new rule. We had conversations about what data EPA might need to assess costs and benefits. We provided some of that data to them, and then those conversations stopped occurring at a productive level. And when we saw the revised draft after OMB vetting was going on, and that revised draft was provided to us, it wasn't reflective of the data that we had provided, and we had the collaboration on the information used on -- to determine the change in jurisdiction

wasn't -- they had not used the data that we had developed, and they had used their own data. So that's the answer for the economic analysis.

The technical support document, we were not part of the development of that document.

Q Okay. But you said you were aware that it was being developed?

A It was referred to in the drafts of the preamble. So we knew that something was being developed. We gained the understanding that it was a combination of the appendices that were part of the proposed rule, plus other information that was being developed.

Q Okay. When you say that the meetings with EPA stopped occurring at a productive level regarding the economic analysis, what do you mean by that?

A We -- and this was at a staff level. I wasn't in these meetings, but they were conversations surrounding the data that we were providing on mitigation. So cost data for mitigation. So the specifics of that cost data, we were providing it when the discussions would occur. It would be the -- and this was between the Corps and EPA. The EPA staff would say: We're going to extrapolate that data that's specific to these mitigation types and say that it can be used for all of these mitigation types because we have specific data. There was a need to extrapolate it, and that was making us uncomfortable. And so the productivity of those conversations was decreasing because we're very -- we, as the Corps and especially in our regulatory program,

want our data represented for exactly what it is. And I understand that there was a desire to be very inclusive and use that data to represent a lot of different things. And so that was the productivity of the conversation declining that I was referring to.

Q Okay. So did those meetings, after they reached this point where the productivity was declining, did they continue?

A Not to my awareness they did not. It was -- and I would characterize it as there was a decision that on -- and I would suggest that this was made on EPA's part, that we have the data that we need. We're going to use this to do the analysis that we need to do, and we'll come back to get additional data when we need it. And our folks were standing ready -- I was standing ready -- to provide additional data where it was necessary.

Q Sure. Did they ever come back to you for additional data?

A Not that I'm aware of.

Q Did you receive or provide any instruction on how to review the economic analysis or technical support document in any way?

A To my staff and to the individuals at ERDC, the Engineering Research and Development Center and the Institute for Water Resources, I asked them to look at both of those documents with their technical review eyes to -- on the economic analysis to assess if the documents were technically sound from their expertise; if the economic analysis document had corrected concerns that we had identified from the draft; if those concerns that we had previously identified had been alleviated; and if it was sound from their economic expertise

standpoint.

From the technical support document, we had previously reviewed a draft connectivity report, and I asked them, our ERDC scientists, to assess, were the concerns that we had been expressing previously, had they been alleviated or had they not?

Q Were you told in any way or did you receive any instructions about how the Corps should treat their review of these documents or to give EPA's analysis or conclusions any deference?

A No. I was not told that. Comments from the Corps were not requested on either of those documents.

Q So comments were not requested, yet you still provided comments to the EPA on both of those documents?

A We provided our technical comments. I provided our technical comments to General Peabody, and he provided them to Ms. Darcy so she would have our technical expertise as she was making her final decisions.

Q So are you aware whether Ms. Darcy communicated those concerns or comments or recommendations, whatever they were, to the EPA at any point?

A I'm not aware.

Q Okay. Did you take any meetings with the EPA on the economic analysis or the technical support document?

A No. Not after we were provided the drafts that were in the interagency review.

Q Did you take any meetings with OIRA on these documents?

A No. Not after they were in interagency review.

Q Before they were in interagency review?

A No. They were not points of discussion.

Q Okay. We know these meetings happened. So are you aware of who in the Army or Corps attended these meetings?

A I'm not aware. We were not --

Q The Corps was not --

A The Corps was not part of those meetings.

Q Okay. In your May 15 memo, you state that some parts of the economic analysis and technical support document have no information on how the EPA obtained their results, including that the EPA grossly overestimates the amount of compensatory mitigation required under section 404 of the Clean Water Act, and such benefits should have been described as costs.

I know you mentioned the mitigation issue earlier. Did anyone at the Army or Corps raise this miscalculation of benefits to the EPA specifically?

A In our initial discussions with our EPA counterparts, we talked about the extrapolation of Corps data that was proposed. So, yes, this was raised. I don't know if Army raised it --

Q Okay.

A -- after they received the memo or not. I don't know.

Q Did the EPA change their characterization of these amounts from benefits to costs in the final rule?

A In the final economic analysis?

Q Correct.

A I don't believe they did.

Q Paul Scodari echoed these concerns in his May 11 memo that was also attached to the Peabody memoranda stating that the Corps has always recognized that section 404 benefits analysis is meaningless, and from the beginning, EPA was intent on including a benefits analysis that would show that the rule's benefits outweigh costs.

Finally, he provided that the Corps, quote, "is just going to have to live with it and leave responsibility for defending it to EPA and OMB."

Have you or any of the Corps been involved in justifying the EPA's economic analysis or technical support document?

A No. I have not. And as far as I know, the Corps has not been part of defending the economic analysis.

Q Okay. Or the technical support document?

A Correct.

Q Do you know whether the Army has engaged in defending it?

A I don't know.

Q Okay. Have you been asked, you or anyone -- are you aware of anyone else in the Corps that has been asked to provide support for the ongoing litigation?

A Yes. We are -- me personally and my team is providing technical support to briefs to ensure that specifics are represented in defense of the rule.

Q Okay. And that would include the economic analysis and the

technical support document.

Ms. Navaro. You know, I think, obviously, we're not very comfortable talking about how the litigation's being conducted --

Ms. Aizcorbe. That's fair.

Ms. Navaro. -- and what kind of internal work --

Ms. Aizcorbe. I'm getting at staff resources. So what staff resources are being used right now to defend the economic analysis and the technical support document? Because that claim was made in these memoranda. So she said that the Corps was not engaged in defending them.

So my question is: Are you engaged in defending the rule, which, from what I am hearing, is yes because you're supporting the litigation, supporting the rule in defense of the rule, as she said it.

Ms. Navaro. Absolutely. Right.

Ms. Aizcorbe. Okay. So that's a yes.

Ms. Navaro. Right. But I would say that if you review the public filings in the litigation, I don't believe the economic analysis has yet come up. So --

Ms. Aizcorbe. But the economic analysis is the basis of the rule.

Ms. Navaro. Right. Okay.

Mrs. Bamiduro. Is this the witness' testimony? I am just confused as to the exchange that just happened.

Ms. Navaro. I just wanted to clarify that we're not comfortable in discussing the litigation. That was the purpose of my comments.

Mrs. Bamiduro. I just want to make sure that we're getting the

witness' statement on the record.

BY MS. AIZCORBE:

Q So let's just redirect.

Do you understand the exchange that just happened?

A Yes.

Q Okay. Would that be a fair characterization of the Corps' current engagement or activities with respect to the rule?

A Yes.

Q Okay. You stated in your May 15 memo that the EPA calculated an increase in jurisdiction from 2.7 percent in the proposed rule to 4.65 percent in the draft final rule, but left the cost estimate value blank for section 404 administrative costs?

A Yes.

Q What accounted for this 72-percent increase in jurisdiction between the proposed rule and the draft final rule?

A It's -- and that's difficult for me to say because we are unaware of what version of the final rule they used when they determined that increase in jurisdiction.

Q And by "they," you mean EPA?

A Right.

Q Okay. You estimated that this increase would result in an increase of approximately $4 million in administrative costs. Did you ever communicate that number to the Army or EPA?

A We were never asked. That's why that line was blank. When that draft economic analysis was shared with OMB in the interagency

review process, we were never asked to provide that number. So in the memos, we shared that our increased administrative costs would be approximately $4 million.

Q Okay. Was the $4 million or any other amount of administrative costs ultimately included in the final rule for the section 404 program?

A In the economic analysis?

Q Yes?

A In the final economic analysis? You know, I don't know. I didn't check before I came. And it might be in there. I'm just not certain.

Q Okay. That's fair. In your May 15 memo, you state that the Corps cannot corroborate the numbers or conclusions in the technical support document, that the rule's distance limits for adjacent waters will protect the types of waters that in practice have been determined to have a significant nexus.

How were these distance limits in the rule determined?

A The 4,000-foot distance limits?

Q Yes.

A I don't know.

Q So you don't know who proposed the limits?

A The 4,000-foot limit was in a draft of the rule that we received. Mr. Schmauder transmitted it to us. I don't know who drafted what he transmitted to us.

Q But it was a draft of the rule --

A Correct.

Q -- where these were located?

And that was the first time that you had seen them?

A Correct. We had received a previous version that had 5,000 feet.

Q Okay. So you are unaware of who decided those limits, then?

A Correct.

Q Okay. And are you aware of the bases underlying the distances that were set?

A No.

Q Were you ever consulted about the distances that were set?

A No. I was not.

Q Okay. Were public comments on specific distances sought, received, or considered?

A A specific distance was not specifically -- public comment on a specific distance was not solicited. It certainly was referred to that a proximity was in the proposed rule as something the agencies would consider as setting a distance threshold. But specific distance thresholds were not put out as something for the public to comment on.

Q Okay. Did you ever meet with or provide examples to Assistant Secretary Darcy on how these limits are incongruent with existing jurisdictional determinations?

A In a briefing, we did share with Ms. Darcy a series of maps and representative examples of approved jurisdictional determinations for aquatic resources that lay outside of these distance thresholds

so that she was able to visualize aquatic resources that were currently jurisdictional that would no longer be jurisdictional as a result of setting distance thresholds as articulated in the final rule.

Q And how were these comments or information received by Ms. Darcy?

A She was very open to hearing the information. I think that I would characterize her reaction as bothered that jurisdiction would be lost over resources that we currently had jurisdiction over. And she wanted to talk about how we were asserting jurisdiction over those resources; and what we saw as the functions and values that those resources were providing; and what the impact of losing jurisdiction over those would be on the overall aquatic resources of the Nation.

Q After that briefing, did you provide any guidance or further comment to the EPA or anybody in the Army on these limits?

A We continued to have conversations within that team of eight in our sporadic conversations that we had about our concerns that we would be losing jurisdiction over these resources.

Q So in none of the team of eight meetings where you were discussing these limits did you ask where they came from?

A Oh, we repeatedly asked. And Mr. Schmauder asked, what is the scientific basis for establishing these limits? And there were some very dynamic conversations about how we were asserting jurisdiction beyond them and whether or not there were ways in which language could be tweaked to ensure that we wouldn't lose jurisdiction. So it was a very dynamic conversation.

Q And specifically regarding the team of eight, just so I understand, I understand we will get a list from you later just to confirm who was in there, but it was EPA, the Army, and Army Corps. Correct?

A Correct.

Q No other organization or office was represented in those meetings?

A Correct.

Q Okay. In your April 24 memo, you provide that the guide book accompanying the Rapanos guidance states that it is not appropriate to determine significant nexus based solely on any specific threshold of distance.

Do you know why these distance limits were included in the final rule despite this assertion?

A I think that a lot of the discussion was that we were needing to provide additional clarity. We were moving beyond what we had provided in the Rapanos guidance. And I think there was a recognition among those of us that had regulated under the Rapanos guidance that there are different ways of thinking about jurisdiction. It's very complicated. And there are benefits to having distance thresholds. It's very easy for the public to understand. It's very easy for a regulator to measure a distance. But it is very difficult to figure out what that distance should or could be, and to be able to support a specific distance threshold with science. And I think the charge in this rule -- I don't think. I know the charge in this rule was to

develop a rule that's supportable by sound science and the law. And so it's difficult to do that.

So the quote is exactly on point. The Rapanos guidance didn't allow us to rely solely on proximity as a determinant for asserting jurisdiction. But I think we were trying to include some piece of that to provide that crystal clear clarity -- that's hard to say -- so that an average person could sort out if the waters on their property were or were not jurisdictional.

Q Okay. In your May 15 memo, you provide that EPA's own connectivity report, the scientific basis underlying the rule, recommend against using line and distance limitations to establish jurisdictional boundaries. Can you again explain why limits were then included, seemingly by EPA, in the rule despite this recommendation in its own report?

A I can't. I can't explain it. Other than it's a policy decision and the policymakers made a decision based on information that may not have been before me but was before them.

Q Okay. You continue in your April 24 memo that to verify the exact portion of waters lost to Federal jurisdiction under these limits, the Corps would need to complete a robust analysis of its data that would yield statistically significant and reliable results and that this is precisely the type of research and analysis that would be undertaken in completing an environmental impact statement.

Did the EPA, Army, or Corps consider this concern in its determination to execute an environmental assessment in lieu of an EIS?

A I don't know what Army considered in their determination to complete an EA versus an EIS. That decision rested with Ms. Darcy. In my suggestion and recommendation of the data, I want to talk about the fact that the Corps doesn't track and didn't track, under the Rapanos, guidance the distance that an adjacent water body is from a downstream traditionally navigable water. And so, therefore, we aren't able to -- we weren't able and still are not able to say, how far those water bodies are away from where we're determining they have a significant nexus to. So that's why without that robust analysis, we can't definitively say how many aquatic resources would be lost to jurisdiction or would be retained within jurisdiction based on this 4,000-foot threshold.

Q So you're saying in an effort to comply with providing the science that underlies this rule and determining exactly how much jurisdiction may be covered by this rule, without the EIS, you really couldn't fully do that. Is that correct?

A We couldn't definitively say -- knowing that up to 10 percent could be lost, we couldn't make a determination of significance.

Q Do you believe that Ms. Darcy understood that concern when she made the decision to execute an EA?

A I think that she understood the data concern. It was certainly conveyed to her. I don't know what else was before her when she made that decision.

Q Okay. And to be clear, then, this type of robust analysis

that you're talking about never -- was not conducted before the rule was finalized?

A It wasn't. That data analysis was not conducted.

Q To your knowledge, did the EPA engage in a NEPA analysis, National Environmental Policy Act analysis, for its own programs under sections 401, 402, and 311?

A They didn't. I believe they're exempt from NEPA.

Q But they could voluntarily conduct an analysis. They didn't engage in any that you know of. Did they?

A I don't believe they did.

Q Okay. In your May 15 memo, you close by saying: The economic analysis and technical support document should not be characterized as anything other than the analysis performed solely by the EPA, and that the Corps should not be identified as an author, co-author, or substantive contributor to either document, and that all references to the agencies should be removed as well as references to conclusions drawn based on the Agency's experience and expertise.

Is this still a fair characterization of the Corps' involvement in the analysis underlying the rule?

A In those two documents, yes.

Q Okay. Moving on, we're going to speak a little bit about the tribal determinations for the rule.

In your May 15 memo, you provide that the statement in the economic analysis that this action does not have tribal implications, as specified in Executive Order 13175, is patently inaccurate, and that

the effects have not been identified and evaluated.

Who decided that the rule does not have tribal implications as specified under the executive order?

A It was not the Corps.

Q Were you given the opportunity to weigh in on this decision?

A No. I was not. My office was not.

Q Okay. Are you aware of who drafted the final summary of tribal consultation for the Clean Water rule, published in May of 2015?

A I'm not aware who drafted that, no.

Q Okay. Were you given an opportunity to review this document?

A No.

Q You also state in your memo that the affected tribes were not consulted as a part of the analysis, which appears to conflict with the EPA and Army's characterization in their final summary of tribal consultation for the Clean Water rule.

Were any tribal consultations conducted in the course of this rulemaking?

A Tribes weren't consulted following the Corps' tribal policy, to my knowledge. We did not engage in any government-to-government consultation with tribes on this rule.

Q Is that something that the Corps typical engages in on rulemakings?

A Yes.

Q Are you aware of who conducted them if they were conducted?

A I'm not.

Q Who within the Army Corps usually conducts the tribal consultations under this executive order?

A We're undertaking a rulemaking right now on the Nationwide Permit Program, and our district offices will consult with the tribes within their areas of responsibility.

Q Okay. And then their recommendations or comments are sent to you?

A Yes.

Q Okay. So in the course of this rulemaking, the Waters of the United States, you did not receive any comments from your district offices regarding tribal consultations?

A No. And they wouldn't have done it on this one. I would have presumed that it would have been Army or the Corps working with EPA with each of the federally recognized tribes.

Q Okay. The EPA and Army Tribal Summary, which I have as an exhibit -- I'll just do this so we can get it --

Mr. Skladany. We'll mark this exhibit 2.

[Moyer Exhibit No. 2
Was marked for identification.]

BY MS. AIZCORBE:

Q As exhibit No. 2. You can have a copy too.

The summary states that: "In the course of this consultation, EPA coordinated with Army, and Army jointly participated in aspects of the consultation process."

Do you know what aspects this document is referring to?

A I'm not aware.

Q Okay. Is this the first time you're seeing this summary document?

A The cover looks familiar to me. But I'm not familiar with the contents of this.

Q Okay. But typically in a rulemaking where the Corps engages in Tribal consultations, you would have a part in drafting such summary to satisfy the executive order?

A That is -- yes. That would be my expectation, yes.

Q Okay. Regarding State outreach, did the Corps conduct outreach with all 50 States regarding this rule?

A The Corps did not, no.

Q Are you aware if the EPA conducted outreach with all 50 States regarding this rule?

A It's my understanding that EPA worked -- and I participated in some of this, not all of this, worked primarily through the State organization so -- ASWM. So that is the Association of State Wetland Managers, ECOS [Environmental Council of the States] -- oh, gosh. And I'm not going to know what that stands for right off the bat. And ACWA [Association of Clean Water Administrators]. So that's the association of -- I'm not going to know -- I can get you what they stand for. So we have relied on the associations that -- the State water quality agencies and wetland managing agencies bring together those State folks.

Q Okay. So you or the Corps did not meet with them, though. The EPA did?

A I participated in some calls with them talking about the rule and soliciting their feedback. I did not participate in all of the discussions with them.

Q Okay. Did you summarize those comments received by the States or share them with anybody in the Corps or Army?

A We discussed State -- I didn't -- there are some of them are written down, but we discussed State input in some of the team of eight meetings. And as we were drafting the rule, some of that came up. But it wasn't a formalized writing down on my part of those meetings.

Q Okay. Were you involved in any discussions regarding certifying that the Waters of the United States rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act?

A No.

Q Are you aware of who made the decision that the rule would not have a significant economic impact on small entities?

A No. The SBREFA stuff is an EPA responsibility. It's not a Corps responsibility.

Q Are you aware that the U.S. Small Business Administration Office of Advocacy submitted a formal comment that the agencies improperly certified this rule?

A I was aware of that letter, yes.

Q Okay.

Ms. Aizcorbe. We also have a copy of Advocacy's comment letter, which we will submit as exhibit 3.

[Moyer Exhibit No. 3
Was marked for identification.]

BY MS. AIZCORBE:

Q Did you review Advocacy's comments after they were submitted to Major General Peabody?

A I read them, yes.

Q Did you make any recommendations based on Advocacy's comments?

A General Peabody and I discussed them. And I don't recall that we made any recommendations. What I discussed with him is that the SBREFA issue is an EPA issue. But we definitely had a discussion about this, and we talked about how this may be being handled moving forward.

Q Were those comments shared with Ms. Darcy?

A I don't know what he did with that conversation.

Q In its comment letter, Advocacy states that the agencies used an incorrect baseline for determining their obligations under the RFA, that the rule imposes direct costs on small businesses, and the rule has a significant economic impact on small businesses.

Were you aware that the 1986 regulation was used as a baseline for this certification, which results in a narrowing of the Clean Water Act jurisdiction; whereas, the economic analysis used current practice

and results in approximate 3 percent increase of jurisdiction?

A Yes. I was aware of that.

Q Did you have any discussion with anybody about the difference of the baselines between?

A That was part of what our concerns were with the economic analysis.

Q Had you had any discussions about the use of that baseline for purposes of the RFA determination before it was made?

A I don't recall discussions on that point, particularly to the SBREFA issue.

Q Are you aware of why the EPA decided to use that baseline instead of current practice?

A No, I'm not aware of why they made that decision.

Q How was your staff involved in the development of the rule's cost? Were you at all engaged in the process of developing a cost estimate --

A No.

Q -- for the rule?

A No.

Q Okay. Do you disagree with Advocacy that the rule imposes direct costs on small businesses?

A I don't really have an opinion on their letter.

Q Okay. And so you don't also have an opinion that it will have a significant economic impact on small businesses?

A I don't -- and it's been a while since I've read it. So,

I mean, you're kind of hitting me cold with this.

Q That's fine. That's fine. Are you aware of the EPA or Army suggesting that they would use informal outreach to satisfy the requirement to obtain input from the small-business community?

A I wasn't aware that they had made that decision. And this is partly because the small-business lift is an EPA lift. And so the Corps was focusing on things that were our responsibility. So -- and that's partly why you're hearing from me that I wasn't concentrating on this. It's not that I don't think that these issues are important.

Q Was the Corps involved or otherwise knowledgeable of the small-business outreach meetings that were being held by the EPA?

A Many of these were happening when I wasn't chief. So I know that from being deputy, Meg was tracking a lot of this. So she may be better able to speak to some of this than I am.

Q Okay. Did you -- or did the EPA, Army, or Corps consider alternatives when drafting the rule?

A Alternative rule language? Absolutely. And alternative approaches, yes.

Q Okay. Are those documented?

A Yes. As I've mentioned before, there were many versions of the rule with many different -- you'll -- when you can -- when you look at the different versions, you can see there were many different trains of thought that were being pursued.

Q Okay. So those alternatives would be included in the administrative record for the rule?

A I don't know if they're in the administrative -- in the official administrative record or not. But there were many drafts.

Q Okay. Now let me change gears. Understanding the communication structure at the Corps and ASA's office, I'd like to ask a few questions about the process engaged during the rulemaking.

Were you ever told that your communications regarding the rule would have to first be reviewed by certain staff?

A No.

Well, let me ask a clarifying question. What do you mean by "communications"?

Q Any communications with respect to the rulemaking, either internally or externally. Were you ever given any direction as to how you were to communicate about the rulemaking? Or that it would have to go through some sort of clearance process before you made a communication externally or internally?

A Not during the process. After the rule was sent to OMB, we did receive a message to -- from Ms. Darcy that said that her office would be communicating with Congress, with the other agencies -- and I don't think she said the public -- but with Congress and the other agencies on the rule. General Peabody sought clarity or clarification on her message, meaning: Do you mean the Corps can't speak at all? And she provided that clarity to say: No. That's not what I meant. And we were able to continue to engage in interagency conversations as appropriate on the rule as it was in OMB vetting.

It was definitely suggested that the messaging documents on the

rule itself were the ones that we needed to use. And we did to the maximum extent that we could. We also developed Corps documents so that our field elements could pull from those the salient points to the regulatory program. The messaging documents that were developed were definitely for the general public. And the regulators in the field, the individuals executing the program, needed things more -- of a more technical nature.

Q So what was Ms. Darcy's specific instructions regarding the communications?

A And I'm recalling. This was a while ago when the rule -- you mean the media documents?

Q The memo that she executed or issued that suggested that your communications should be treated in a specific manner.

A It wasn't from her. It was from a member of her staff who deals with public relations. It was, here are the messaging documents, the press release, some fact sheets on the rule, after it was finalized. These are for dissemination. These are the documents that will be used. And that's what we used. We also developed internal documents and talking points for our district commanders and our regulatory chiefs to use that were more specific.

Q But you were never told that any of your communications had to go through any clearance of any kind?

A Correct. We were not.

Q Were you ever told or feel pressured to treat your communications in a certain manner with respect to the comments made

to public or that may become a part of the administrative record?

A No. I think that we weren't told that.

Q Were you ever told or feel pressured to treat your communications regarding the connectivity report in a certain manner?

A Yes. There was a memo in I forget when in 2013 -- it wasn't sent to me; I was deputy then, so it was prior to June -- that indicated that any comments on the connectivity report must be sent to Army and Army would share them.

Mrs. Bamiduro. I missed the last part.

Ms. Moyer. That our comments must be sent to Army, and Army would share them.

Mrs. Bamiduro. Thank you.

BY MS. AIZCORBE:

Q Is that common for a rulemaking where you would be asked to send all comments on a scientific product to Army before they're shared externally?

A It hadn't been common in this rulemaking. We had been sending comments to EPA and sharing feedback with EPA. So it was a change in practice on this one for the request to come from Ms. Darcy to General Bostick that the comments come through her office.

Q And that was regarding any communication regarding the connectivity report?

A That's my recollection.

Q So that would mean that any staff who discussed the connectivity report would not be able to engage directly with EPA staff.

Correct? Like the Corps staff would have to go up through the Army before those comments were shared with EPA?

A That's my recollection of the memo.

Q Okay. Were you informed of the dates that the administrative record would cover?

A I'm sure I have that in a memo. But I don't have it in my head.

Q Staff understands that it's from April 2014 on. Are you aware of, for purposes of compiling the administrative record from April 2014 on, with such a limited period of time, do you have any indication why this period would not cover the entirety of the rulemaking?

A No. I don't. Because it's been a long period of time.

Q Is that a direction -- as far as your documents retention for purposes of compiling the administrative record for rulemaking -- is that a direction that would come from Army or from EPA typically in these joint rules?

A My direction comes from my internal counsel about what to retain and how to retain it and --

Q Okay.

A -- my guys are always very inclusive. So --

Q Okay. Were you ever told in any way or feel pressured to conduct your work to achieve a specific result?

A The Corps has never directed me to do anything to achieve a specific result.

Q Okay. Were you ever told in any way or feel pressured to alter the course of your work or data to achieve a specific result?

A The Corps has never directed me to do that. No.

Q Have the Army or EPA directed you to do that?

A No one has directed me to alter my work, and nor would I.

Q Okay. Were you ever told in any way to speed up the process of your work or the rulemaking?

A And I think we talked about this a little bit already. There was talk about we need to be finished or we expect to deliver a product to OMB. First it was in early 2015, and then that shifted to spring.

Q Okay. Were you ever told in any way that certain information would not reach the EPA, the public, or other body as intended?

A No. I was never told that.

Q You were never told that the Peabody memoranda would not be seen, delivered, shared, or released?

A Oh. Thank you for asking -- for clarifying that. Yes. I did hear that the -- that those memoranda would never leave Army.

Q Okay. And who told you that?

A Mr. Schmauder said that. And I will say that they were never intended to go any further than Ms. Darcy.

Q Sure. Was Mr. Schmauder the only individual who communicated that?

A Yes.

Q Okay. Did you discuss that with Mr. Peabody?

A I believe we must have. I don't recall specifically discussing it with him. But I believe we must have because our intent was for them never to go beyond Ms. Darcy.

Q Sure. Were you ever told in any way or feel pressured to achieve the administration's objective in this rulemaking?

A I did not feel that pressure. My sole objective in this effort was to provide the best technical advice and recommendation for options as I could.

Q Did you ever engage in any communications where the administration's objective was discussed in the manner that suggested that your work should work toward what they were seeking out of the Waters rule?

A I didn't feel as though it was ever discussed in an overt way the way that question characterizes it. No. I mean, to me, the objective was very clear, that providing clarity to a rule that is pertaining to jurisdiction and supportable by science and law.

Q Okay. At any other point during your tenure with the Corps, did you feel pressured to direct the Corps' work or data analysis to achieve a certain result?

A No.

Q Were you ever told in any way or feel pressured to avoid completion of an environmental impact statement?

A No.

Q Nobody ever communicated to you that you should conduct an

environmental assessment instead of an environment impact statement?

A They didn't communicate that to me. The NEPA analysis was happening at Army. It wasn't happening in the Corps.

Q The Army executed the NEPA document for this?

A Preparation, yes.

Q Okay.

A So it was not happening in my office.

Q Does Army always prepare the NEPA documents for rulemaking --

A No.

Q -- for the Corps?

A No. This was a unique circumstance. And it was being prepared at Army. Army offered to do this starting further back in the process because we were doing guidance; then we switched to a rule; we were back in guidance; and then we switched to a rule again. Army offered to do this because my staff and I had too much on our plate. So they offered to draft what was an EA and remained an EA because I didn't have the staff to support that effort. And so it stayed there. Normally, we do the NEPA documentation in my office.

Q You mentioned before that you had recommended that an EIS be conducted. Was one ever drafted?

A Not to my knowledge, no.

Q Nobody ever began drafting an EIS?

A To my knowledge, no.

Q And you don't know why an EIS was not pursued by the Army,

despite your recommendations?

A It's my understanding that Army reached a different conclusion.

Q Do you know when that decision was made?

A The --

Q The decision to pursue an environmental assessment versus an EIS.

A It's my understanding that an EA was drafted, and the conclusion was a finding of no significant impact, not that it was a finding of significant impact. So they concluded their EA at the time that the rule was finalized.

Q Who drafted the EA?

A The EA that supported the rule was, I believe, drafted by Gib Owen.

Q Was there another EA that didn't support the rule?

A I believe that there was an initial draft that was -- that was completed earlier on in the process.

Q Do you know who completed that?

A I believe that was completed by Chip Smith.

Q So why was Chip Smith not drafting the second EA?

A I think you'd have to talk to Mr. Schmauder or Ms. Darcy about why there was a change in staff. I'd have to speculate.

Q Okay. Do you know how long Mr. -- you said -- was it Gib Owen who completed the EA?

A Yes.

Q How long did he work on the rulemaking?

A I believe he started working on it in the April timeframe.

Q Okay. So he didn't have much time on this rulemaking at all before he was brought on to conduct the environmental assessment?

A That's correct.

Q How long had Chip Smith worked on the rulemaking?

A Since the beginning.

Q But you said you're not aware as to why he was taken off?

A I'd have to speculate.

Q Are you aware of any other change in duties of Mr. Smith's?

A No. I just -- he no longer works on Clean Water rule issues.

Q Yet he'd work on it since the beginning?

A Correct.

Q Was that -- is his background in Clean Water jurisdiction?

A He is the Special Assistant for Tribal, Regulatory, and Environmental Issues in Ms. Darcy's office.

Q I believe earlier today you said he was the point of contact in the Army office on this issue. So I'm just trying to get a handle on why this was changed, why he was taken off the rule.

A And I would have to speculate about why he was taken off.

Q Okay. To your knowledge, do you know whether Mr. Owen was trained or coached on how to execute the environmental assessment?

A I don't know.

Q Or what information he was provided since he'd only been

working on the rule since April?

A All I know is that I answered a few questions for Mr. Owen. But I did not provide him a lot of information. I don't know what he had available to him other than a few questions that I answered by email for him.

Q Okay. Do you remember what those questions were?

A I provided definitions of what an approved jurisdictional determination was, what a preliminary jurisdictional determination was --

Ms. Fraser. Can you keep your voice up?

Ms. Moyer. Sure. And some information on the numbers of jurisdictional determinations of each type that we do. And some basic regulatory program information.

BY MS. AIZCORBE:

Q This basic regulatory program information and some of the definitions that you were just saying, are those things that your regulatory staff would typically know?

A Yes.

Q So isn't -- in your opinion, is it a little questionable as to why they would be putting somebody in charge of writing the environmental assessment who doesn't know what these basic regulatory terms mean?

A It was interesting to me that those were the types of questions I was answering.

Q Especially in light of your recommendation that a robust

analysis that only an EIS could provide was decided against in the Army?

A And, again, I don't know what other information was before Ms. Darcy when she made that decision.

Q Are you aware of any other staff whose duties changed with respect to their work on the rule, especially somebody who was as focused on the rulemaking as Mr. Smith?

A I don't know. And, again, I'm not in that office. So I don't I don't know.

Q Sure. Are you aware then -- I guess my second question would be -- of any retaliatory measures that were taken on any of the staff who worked on this rulemaking?

A I'm not aware. I would think you'd need to talk to Mr. Smith.

Q Okay. Did the Corps have any -- does the Corps usually receive deadlines under which they perform their EAs or EISs?

A We are usually working to milestones. We don't -- and I don't think this was a deadline that this document was being produced under. I think that Mr. Owen was most likely working to a milestone. So, no, we aren't usually working to deadlines.

Q So you're not aware of any time or deadline that he was given to finish his environmental assessment?

A No. Because he was -- I don't -- I'm not aware of any. He may have had one. I'm not aware.

Q Were either of the environmental assessments circulated for interagency review?

A I'm trying to recall whether the EA was circulated in the OMB process. I'm not being able to recall if it was or was not.

Ms. Aizcorbe. That was all I had, actually, on this. Okay. I think we're ready to switch.

Mr. Hambleton. Go off the record.

Ms. Aizcorbe. Go off the record. Thank you.

[Recess.]

RPTR MAAR

EDTR HUMKE

[2:23 p.m.]

BY MRS. BAMIDURO:

Q It's 2:23 and we'll go back on the record.

Hi, Ms. Moyer.

A Hi.

Q My name is Portia Brown. And I am with Ranking Member Cummings staff -- that's right. My name is Portia Bamiduro. Brown is my maiden name. Thank you.

And I just want to ask you some clarifying questions about some of the testimony that you provided earlier today. And I apologize if I might bounce amongst a variety of different topics. You mentioned before that there was some sort of timing associated to which you were working on the rulemaking. Is that right?

A Yes.

Q Is it uncommon to have some sort of estimated deadline in working on rulemaking?

A It's not uncommon depending on the type of rule we're working on. I was not dismayed that we had some timing expectations. And it was not concerning to me that that timeframe kept shifting.

Q I think you mentioned in the last hour that public comments were not solicited regarding a specific distance for a bright-line rule. Was that accurate?

A Right.

Q Do you know whether, in fact, public comments were received regarding a specific distance?

A I don't recall if we received specific comments that stated certain distances. And that's just because my brain doesn't retain as much as it used to.

Q Sure. But I think you also said in the last hour that you did not review all of the comments. Is that fair?

A That is fair.

Q In the last hour, you were asked about some staffing decisions that were made. Do you know the bases for the staffing decisions that were made on who would be working on what various parts of the rulemaking?

A At Army?

Q At the Corps. So let me be specific. I believe in the last hour, you were asked about the people or the persons who were writing the economic analysis. Is that right?

A Yes.

Q And there were some staffing changes that were made as that was being drafted. Is that correct?

A Right. We didn't draft the economic analysis. So any staffing shifts that were made within the Corps' Regulatory Program, I can talk to. But the economic analysis it's my understanding was drafted at EPA.

Q Do you know the qualifications of the person or persons who

drafted the economic analysis?

A At EPA?

Q Yes.

A No. I do not.

Ms. Fraser. In the last hour, you were asked about an EA. Now, that could be either economic analysis or environmental analysis.

Ms. Moyer. Right.

Ms. Fraser. Now when you were talking about staff changes, were you referring to the environmental analysis or the economic analysis?

Ms. Moyer. I was talking about the environmental assessment that was done at Army.

BY MRS. BAMIDURO:

Q And so for the environmental assessment that was done at the Army, were there staff changes regarding who drafted that?

A That's my understanding, yes.

Q And do you know the bases for those staff changes?

A No. I don't.

Q I believe in the first hour, you were asked about meetings that took place among the "team of eight." And I'm using air quotes for the record. And you said that meetings stopped around November 6th, is that right, 2014?

A Correct.

Q And then resumed again middle of January 2015. Is that right?

A That's right. They were sporadic after they resumed in

January.

Q So during the period of November 6th through roughly middle of January 2015, did all communication stop as well?

A Communications among that group of eight, team of eight ceased. There were still individual communications between me and my EPA counterparts on regular program execution issues. I continued to touch base with them and they with me on general matters and overarching matters pertaining to our efforts at reviewing and categorizing comments and our efforts at reviewing specific jurisdictional determinations to inform the economic analysis.

Q And I believe you said earlier, but I just want to clarify for the record, that you are not aware whether communications above you were still taking place during that November 6th, 2014 to, middle of January 2015 period. Is that right?

A That's right. I do not know.

Q Okay. You've stated that you've been involved in rulemaking prior to the WOTUS, I'm calling it the WOTUS -- Waters of the United States 2015 rulemaking. You've been involved in other rulemaking. Is that right?

A Yes.

Q And you said with regard to this particular rule that technical comments, and correct me if I'm wrong, were to go up through the Army and that the Army would share them with the EPA. Is that right?

A That was a memo that was received from Ms. Darcy to General Bostick, who is the commanding general for the Corps of Engineers,

specifically related to the connectivity report.

Q Okay. In your other rulemaking experiences, have you ever encountered a situation where comments would go up through the Army first before being shared with another agency?

A That hasn't been my experience on the other rulemakings I've been involved with.

Q Do you know why that was the process that was laid out here?

A Specific to the connectivity report, so it wasn't on the whole rulemaking, it was just specific to the connectivity report --

Q Sure. Thank you for that clarification.

A -- I don't know specifically why that directive was given. I don't.

Q Do you have any reason to believe that the comments were not shared with the EPA on the connectivity report?

A I don't have any reason to believe that they weren't.

BY MS. FRASER:

Q So, Ms. Moyer, I wanted to talk to you about some of the comments that you made in your technical analysis that was attached to the memorandum to Major General Peabody. Now, what exactly is a technical analysis as far as the document that you put together?

A Can you tell me specifically which one you're talking about? Is it the May 15th?

Q Yes.

A So this technical analysis is a compilation and a reflection of comments that were received by me from our scientific staff at the

Engineer Research and Development Center and Institute for Water Resources, as well as my staff at headquarters after they reviewed the technical support documents and the economic analysis.

Q So they contributed content to the technical analysis directly to you?

A Yes. They did.

Q Were those contents received in writing?

A Some of them were. And some of them were expressed to me verbally.

Q And you essentially took these comments and compiled them into this technical analysis?

A I did. And I also read the documents.

Q Besides you writing it, who else contributed to the writing of this document?

A Nobody.

Q So you just took everybody's and aggregated the information and put it in this document?

A And included my own analysis.

Q Now, in this memorandum, you said it was unknown to the Corps that until early February that the Army and EPA were contemplating a bright-line cut-off for CWA jurisdiction either at the 5,000 or 4,000 linear feet from the ordinary high-water mark or high tide line and a robust interagency discussion on potential effects of the bright-line and currently jurisdictional bodies have continued on that time. Did you say that in the memo?

A If it's in there, then, yes, I did.

Q Is it possible that even though you did not know that these discussions were taking place, that they were, in fact, taking place and that the content was being shared with Ms. Darcy?

A That is certainly possible.

Q Do you know whether or not anyone else, besides staff of your regulatory shop, was involved in these discussions and provided information to the Army or the EPA?

A From the Corps of Engineers?

Q Yes.

A I think that the probability of that is extremely low.

Q But it's entirely possible, right? It's a question.

A Anything is possible.

Q One of the statements you made in your memorandum was that, and we discussed with you, you testified in the first half of the hour that in order to verify what portion of the 10 percent jurisdictional waters would be lost to the CWA jurisdiction. There would have been a need for a type of analysis that should have been undertaken under an environmental impact statement, right?

A That's what I said, yes.

Q Now, you are aware, and we were talking about this just briefly, that the assistant secretary's office conducted the environmental assessment, right?

A Yes. They did.

Q And you mentioned that two people that you know of

contributed to writing that environmental assessment, right?

A There were two individuals who drafted environmental assessments.

Q Do you know whether or not it was limited to just those two people? Or could there have been other contributors?

A It's my understanding that there were other contributors to both of those documents.

Q Do you know who they are?

A I know that to the initial draft environmental assessment. There were several of our professional developmental assignments who contributed. And then to the second environmental assessment, there were several contributing authors, two individuals from the New Orleans district, and then several of the other staff from the Secretary's office.

Q And the folks who contributed from the New Orleans district, they are Corps staff members?

A I believe they are, yes.

Q What capacity do they serve in?

A I believe they're from our Planning Division in the New Orleans district.

Q And so they would be outside of your regulatory shop?

A Yes. They are.

Q Do you know whether or not the individuals from the Corps were involved in any other aspect of this rulemaking besides offering the environmental assessment?

A I don't know if they were or not.

Q Do you know if anybody else besides those two were involved in any other aspect of this rule?

A I do not know if there were other staff members. I would be curious as to what their technical contributions would have been.

Q Now, the two people you mentioned from the Army were Gib Owen?

A Yes. Gib Owen was one. And I believe there were two economists that were involved in the drafting of the environmental assessment, the second one.

Q The second one was dated when?

A That was the one that accompanied the final rule.

Q Is this the one that has the finding of no significant impact, is that it?

A Yes. That one.

Q When was the approximate date of this document?

A I would say it was in the April, May timeframe.

Q You mentioned that the two people in the Army were economists. Are you familiar with what their qualifications would be?

A I would assume their educational background is in economics. I don't have a copy or have reviewed their resumes, no.

Q You say you think they're economists. Do you know their names?

A Yes. Tom Hughes and Maryanne Metheny-Katz.

Q Now, as far as, have you read the environmental assessment?

A I have skimmed it, yes.

Q You've skimmed it. Do you know whether or not, based on what you've looked at, whether or not this document is written in harmony with NEPA?

A It follows the format of NEPA, yes.

Q And what was the purpose of doing the environmental assessment?

A The purpose of doing the environmental assessment was to examine alternatives specific to the 404 program pertaining to this rule.

Q Well, would one of the purposes be to document the potential environmental effects of the rule, including 404?

A Well, it would just be specific to 404, but yes.

Q Would another purpose be to decide whether or not an environmental impact statement was necessary for the proposed rule?

A That is one of the purposes of doing an EA.

Q So this EA, and the EA in this case we're talking about the environmental assessment not economic analysis, they found that there was no significant impact, right?

A That is the conclusion, yes.

Q Once there's a finding of no significant impact, then it means they will not proceed to an EIS, correct?

A Correct.

Q And this was a finding by members of your staff as well as members of the Army staff and their conclusion, right?

A Not members of my staff, no.

Q Well, members of Corps staff, right?

A Correct.

Q And when I say your staff, I mean the Corps.

A Okay.

Q Now, so you're disagreeing with your staff that an EIS was not necessary here, Corps staff?

A It's not my decision to make. It was Ms. Darcy's decision. She signed the FONSI.

Q Well, did you make a statement earlier that you felt that an EIS was necessary here in order to justify loss of 10 percent CWA jurisdiction?

A I said the type of analysis that would be included in the EIS was necessary to sort out what the level of impact was and to make a determination of significance. That analysis isn't included in that EA.

Q So if you're going to do the type of analysis that would be consistent with an EIS, then why not do an EIS? Could you do some lesser type of analysis?

A That environmental assessment didn't look at the data that I suggested needed to be looked at.

Q So you're saying that of the 4 or 5 professionals that created this document, that you felt that something greater was needed than what they did?

A Yes. That was my recommendation.

Q And you made this recommendation clear to Ms. Darcy?

A Yes.

Q And you felt that she was informed by inadequate information based on this document that was prepared?

A My recommendation was that further data analysis was needed to determine the types, the impacts to the types of resources that may be lost.

Q Besides in this memo, did you make an independent proposal to do a more detailed analysis yourself?

A It was included in my memo, the type of analysis that I thought was necessary. I understand that Ms. Darcy made a different decision. It was her decision to make.

Q Now, you mentioned that this rulemaking was going to result in a 10 percent loss of Clean Water Act jurisdiction. How exactly did you arrive at 10 percent?

A And what I put forward is it could result in up to a 10-percent loss of jurisdiction.

Q What are you basing that on?

A What I based that on is, and it's technical and I can point to you where in the memo I talk about it. It might be helpful. What we track is that -- within our program, we don't specifically demarcate how far away nonadjacent or adjacent, non-abutting wetlands are from their downstream traditional navigable water, to which we have to determine significant nexus. So approximately 10 percent of the adjacent waters under the Rapanos guidance are adjacent, non-abutting

wetlands. So a certain percentage of those are outside of 4,000 feet. We don't know what percentage of them. So we have to make an assumption that it could be up to that full 10 percent.

So it's that analysis that we would have to go through and look individually at all of those documentation forms for jurisdictional determinations to figure out what percentage, and then sort out what are the functions being provided by those jurisdictional aquatic resources to determine how significant that potential loss of jurisdiction would be.

Q Right. So by the time you got the 10 percent, you're basically speculating based on what you thought the data would show once the rule got implemented, right?

A What my assertion is is that it could be up to 10 percent.

Q Could be up to 10 percent. And in your estimation, that 10 percent is a line that you have determined would cause a negative impact to the environment and to humans?

A I never even got to the point of suggesting that the impact to those would be significant or not. I can't even tell what that percentage actually is.

Q Can you take a look at your memo, paragraph 7.

A That's exactly where I am.

Q Okay. Without a detailed analysis to assess the impacts of loss of 10 percent CWA jurisdiction would present the potential for significant adverse effects on the human and national environment.

A Exactly. Without knowing what it actually is, we can't say

that they wouldn't be.

Q Now, based on the fact that you've decided that up to 10 percent of the jurisdiction could be lost, you felt that the information that the secretary was relying on in making her decision to go along with this rule was flawed?

A I felt as though she needed this information and she needed specific examples of the types of resources that would be lost with the 4,000-foot threshold. And that's what she was provided.

Q Let's talk about your comments on the tribal consultation. Now, you said that the EPA's representation is patently inaccurate when they said that the economic analysis, I'm sorry, that the expansional loss of waters would not have significant effect on tribes. Now, you said that the EPA was inaccurate when they made that statement?

A You're right. I said that.

Q You also said that you were not privy to the outreach that EPA did with the tribes. Did you?

A I said that I did not participate in the outreach sessions that they did with the tribes. I was aware of the sessions that were scheduled with certain groups that represented tribes. But there certainly weren't individual government-to-government consultation sessions with the 500 and X number of Federally recognized tribes on this rule.

Q How do you know who EPA met with and what they talked about if you were not present in those meetings?

A Well, I can base that comment on the fact that there were

400 outreach sessions and there are over 500 Federally recognized tribes.

Q Is it possible that one tribe could go to more than one outreach? Or more than one tribe could show up at one outreach?

A And I guess I'm basing my comments on the fact of my understanding of the Corps' tribal consultation policy. And that is that outreach sessions don't comprise government-to-government consultation on an action. So to also suggest that changes in jurisdiction don't affect tribes is, on its face, a statement that doesn't make sense.

Q I want to, let's stick with, not with the Corps' position so far, let's talk about what the EPA did. I just want to clarify. You were not involved in EPA's outreach, nor were you involved in any of the EPA's interactions with tribes regarding the development of this rule, right?

A We've already talked about that.

Q I just want to be clear. What was your answer?

A Correct.

Q Okay. And did you read any reports, or documentation, or receive communication, directly from the EPA about what the content of those interactions were?

A There were none provided until this was received.

Q And do you know when EPA started its outreach and interaction with the tribes and when that interaction ended for purposes of developing this rulemaking?

A Other than what is presented in this document, no, I don't.

Q According to what was presented in that document, when did EPA start and when did they end their interactions with the tribes regarding this?

Ms. Navaro. Do you want her to sit here and read the document?

Ms. Fraser. Are you familiar with this document?

She mentioned that other than what is in the document.

BY MS. FRASER:

Q I assume that you read it?

A I haven't read it recently. I mean, I can sit here and read it and recite it to you.

Q I'm not going to ask you to. I'm going to direct you to page 4 of the document. Under the heading consultation. Do you have any disagreement with the statement that EPA began consultation with Federally recognized Indian tribes on this rulemaking in 2011 and continued the consultation and coordination process, including providing information on the development of an accompanying science report on connectivity on wetlands, steam lands, through November 2014? Would you disagree with that?

A I don't know what they did. So I can't agree or disagree.

Q So when you're making statements about EPA's interaction with tribes being inaccurate, what are you basing your statements on?

A My statement was a comment on their statement that it doesn't affect tribes. It wasn't on whether they consulted or didn't consult.

Q You are aware that tribes issued comments to this rule, correct?

A A few tribes submitted comments, yes.

Q Are you aware of what the substance of those comments were?

A I read a great number of them, of the ones that were submitted. I think there were 14 or so comments that were submitted.

Q As far as you can recall, what were the gist of those comments with respect to the rule?

A Those comments were, they were from business councils of tribes, they were, I don't remember the specifics quite frankly. I remember some of them but not all of them. And that's not the point of what I'm saying. It's not whether the tribes that wrote in supported the rule or didn't support the rule. It's the statement that the rule doesn't affect tribes.

Q If the comments from the tribes --

A The few tribes that wrote.

Q The few tribes that wrote, you said 14, would it surprise you if it was more than 14?

A It might.

Q And so how do you come to your conclusion again that this rule affects tribes without having spoken to tribes or the EPA who interacted with them?

A This rule affects every landowner in positive and negative ways. So a statement that it doesn't affect tribes is a statement that doesn't make sense on its face.

Q Now, you talked about, we talked about the 10 percent jurisdiction being lost. Now, you said Ms. Darcy was open to hearing the information she was provided that jurisdiction could potentially be lost. Is that accurate?

A That's how I would characterize her reaction. I don't know what she was actually thinking.

Q So what do you mean characterize her reaction? Did she say something that alerted you that this was a problem to her?

A She was looking at the pictures I was showing her with concern, asking a lot of questions.

Q And what kinds of questions did she ask about the pictures?

A She was saying this is currently jurisdictional, what functions does it provide, it would now be non-jurisdictional if we have 4,000 feet, how far away is it from the 4,000 feet, questions like that.

Q Did you understand when this rule was being drafted that part of providing clarity to the public in terms of what was going to be jurisdictional and what was not going to be jurisdictional waters, there could be a potential that there would be loss of Clean Water Act jurisdiction?

A I think that that's inherent in anything that's developed, yes.

Q The fact that there was some loss of Clean Water Act jurisdiction was not surprising then?

A I think that surprising is not the word that I would choose.

Q How would you characterize it?

A I think that the trade-offs that were being made in terms of the jurisdiction that was being proposed to be gained potentially over categories of waters that we hadn't had jurisdiction over for quite some time, since the SWANCC decision, trading that off for the loss of jurisdiction over waters that we had had jurisdiction over since the beginning of the Clean Water rule was something that was puzzling.

Q But that's not a decision that was up to you to make. Is that right?

A Correct. We've talked about this before.

Q Right. We have. Now, one of the things that you mentioned, one of the trade-offs that you just mentioned was, for example, there was going to be a loss of jurisdiction regarding some adjacent waters, right, some wetlands that are adjacent to territorial waters, right?

A Adjacent wetlands, yes.

Q And one of the ways that Clean Water jurisdiction was lost in some of these adjacent wetlands was by the statement being asserted into the rule that these are now no longer adjacent. For example, land that's typically under farming or silviculture, or something else, those were no longer going to be considered adjacent and, therefore, definitely out of CWA jurisdiction. Is that accurate?

A No. I don't believe it's accurate. I think that that clause that was inserted into the adjacency paragraph means that those waters that would normally be subject to the adjacency clause that are

under agriculture now are subject to a case-specific significant nexus determination under paragraph A8.

Q So that means that the Corps will have to make those discussions once the landowner makes an application to find out whether or not their water is within the United States or not?

A The Corps or EPA if they're subject to another program of the Clean Water Act.

Q And that is what the status quo is now. Is that right?

A Correct.

Q Now, you mentioned that you still hold the position that the Corps should take its name off of this document, off of the economic analysis, and the technical support document?

A The Corps' name was never on the technical support document. It's an EPA document. And the economic analysis is represented as an EPA-Army document.

Q And you maintain that the Corps should not allow its name to remain on that?

A Right. They are not Corps documents.

Q And when you say they are not Corps documents, what do you mean?

A We were not involved in the drafting of those documents. And they don't reflect the Corps' experience and expertise. And they appropriately reflect, especially the technical support document, that it is an EPA document.

Q So did you discuss these concerns with the Army?

A They are reflected in the memos that were provided.

Q I know they're reflected in the memos. Did you have a discussion, verbal discussion, about these particular concerns with someone in the Army?

A Neither of those documents were provided to the Corps to look at until they were sent to OMB for interagency review, which was after the rule was sent to interagency review with OMB. So there wasn't the opportunity to have this conversation with anybody.

Q Do you know whether or not Ms. Darcy or someone else in her office had discussions about these documents with the EPA?

A I don't know.

Q Do you know whether or not anybody in that office agreed to the terms of those documents such that the Army's and Corps' designation was incorporated into those documents?

A I don't know.

BY MRS. BAMIDURO:

Q I just want to take a step back and talk about your expression of your concerns regarding the final rule to folks in your chain of command. Over the course of the rulemaking, are you able to quantify approximately how many times you had occasion to express your concerns about the rule?

A To people within the Corps of Engineers?

Q Yes.

A I need a timeframe that we're kind of --

Q At what point did you begin expressing concern about your

concerns about the rule?

A I would say I started expressing concerns when our team of eight meetings stopped in November. Because I thought that it was important that we continue as an interagency group to have conversations, understanding that in joint rulemakings that we have participated in the past, that although, and in the Waters of the U.S. rulemaking guidance, rulemaking process over the past number of years, that although we don't always have a party when we're in those rooms together, it's important for us to have those conversations.

So I started expressing concerns then. Those, I continued to express regularly concerns once our conversations began again and we were receiving documents and revised documents that were not reflecting, in my view and in my colleagues' views. So my Office of Counsel colleagues' views, the concerns that we were discussing in those meetings. So that was happening on a regular and recurring basis.

Q So for the period of time that you're referring to, are you able to quantify approximately how many occasions you had to share your concerns?

A Within the Corps of Engineers, I would say from the -- I'll pick it up again in mid-January through to when the rule was delivered to OMB, we would discuss this on a weekly basis with General Peabody.

Q So, if I'm following you, on a weekly basis from November, early November to mid-January?

A I would say that was probably on an every other week basis.

Q Okay.

A We'd do a temperature check. And then from mid-January to April, it was on a weekly basis. And then from April until the rule was finalized, I would say it was several times a week we would be discussing.

Q So we're talking dozens of opportunities. Is that fair?

A That we were discussing it with Corps senior leaders, yes.

Q Okay. And then are you able to quantify how many opportunities you had to share your concerns with the Army?

A And I will distinguish between Mr. Schmauder and Ms. Darcy.

Q Okay.

A Mr. Schmauder, we were having conversations with him probably in the November to mid-January timeframe, maybe once a week, maybe once every other week. Then from mid-January to April, I would say most likely once a week, once every week and a half. Between the timeframe of when the proposed rule was put in the Federal register to when the rule was sent to OMB for interagency vetting, I met with Ms. Darcy four times.

Q And let's just break down, let's go through each of those four times. Do you recall when those meetings took place?

A Yes. One was November the 29th, 2014. One was the 29th of January. That was hearing prep for the bicameral hearing that she and Ms. McCarthy did. And there were two in March, I want to say March 11th and the other one was towards the end of March. I'm not quite sure of that date.

Q Who all participated in those meetings?

A That's going to be hard for me to --

Q That's fine. I'll ask another question.

A Okay.

Q Do you recall the nature of the concerns that you raised in each of those meetings?

A The November 29th was getting her familiar with what we were talking about in our team of eight meetings at that time. So that would have been the charge that we all had to develop options for the development of that first draft of the draft final rule.

So we were getting her familiar with where we were in alignment, the Army-EPA team, and where we had points of -- that we were going to work to resolve to bring then a suite of options to her and Ms. McCarthy. As I said, the one right before the bicameral hearing, that was hearing prep, so getting her very familiar with the issues and just getting her ready for that testimony.

So that was Waters of the U.S., but it was also a much larger briefing. The two in March were talking about implementation concerns with the draft final rule that I had circulated to the 38 district regulatory chiefs for their comment, and the preamble language. So I had gotten back from the districts if this was finalized exactly as written, I asked them specifically for their comments of what would you need from us in terms of guidance, what would the regulated public be saying to you about implementing this. So where do we need to tweak in terms of clarity, in terms of implementability, in terms of what

does this do to you, regulatory chief, for implementation.

So it was those sorts of things, where do we need to add definitions, tweak definitions, do those sorts of things. So that was that briefing. And that was also when we first talked about the bright-lines. The second briefing that month was an additional briefing on the bright-lines and with the representative examples so that she could see what we were referring to in terms of what would be lost, what would be gained. And we talked about that data analysis piece that would be required, in our mind, in order to be able to definitively tell whether the impact would be significant or not from this rule.

Q Would it be a fair characterization to say that the Corps' concerns were presented to Ms. Darcy and those in her office?

A I would say that in the times that we had with her, we were able to present our largest concerns. I would say that there were a lot of ancillary concerns that we didn't get a chance to talk all the way through because we had some big pieces that we wanted to make sure she understood fully.

Q But the largest of the Corps' concerns were sufficiently presented to Ms. Darcy and those in her office, is that fair?

A She certainly was able to hear and ask questions about the biggest pieces, yes.

Q And do you know, and I apologize if this has been asked already, it's been a long day, and I don't also retain everything that we've talked about either, but do you know who from the Army had an

opportunity to present their data and concerns to Ms. Darcy?

A Outside of the meetings that we were in, I don't know who else she was coordinating with. I do know that in our briefings, Craig Schmauder was a person who was also contributing to our discussions. Chip Smith was there and was contributing as well.

Q Do you know the frequency with which those meetings were taking place with Ms. Darcy?

A I don't.

Q Do you know the time period over which those meetings were taking place with Ms. Darcy?

A No. I only know the ones that I was at.

Q Okay. And I believe you stated earlier that one of the objectives in setting out to undertake this rulemaking was to come up with a rule that could be supported by science and the law. Is that right?

A Correct.

Q Were you also or was the team also given a directive to come up with a rule that addressed concerns by the regulated public?

A That wasn't specifically in the charge. But that's to me, what -- that was inherit in listening to the public comments. I mean, the regulated public is part of the comment body that we got. That was the regulated public as well.

Q Do bright-line delineations offer clarity to the regulated public?

A They do. And why you're seeing me cock my head a little

bit is I think bright-lines are very helpful I think when, and I will say when you read the rule, the language is clear, they're grammatically correct sentences. But when you read a 4,000-foot threshold, that's easy to understand. It's harder to implement on the ground. Because, and this is going to sound funny and it is in a certain sense, but nobody has a 4,000-foot-long tape measure. And it's hard to implement that.

So for the regulated public, the questions we get back is how do I know when I'm 4,000 feet away. You know, my wetland in my background, how do I know where the nearest thing that I'm measuring to is, how do I know where it is. So those are the questions that we get back. So the language can be very clear, but it's the actual practical implementation of it that gets tricky. So I guess that's a very long way of answering your question.

So, yes, the regulated public does benefit from clear, bright-lines. But the implementation piece does get to be a challenge. But I think it's a challenge that can be overcome with follow-on guidance and materials that we can use with the public.

Q And are there challenges to implementation of most rules?

A Yes. Absolutely.

Q There was some mention, I believe, in the first hour of why was the EPA in a rush to finalize this rulemaking. Is that how you would characterize it?

A I wouldn't characterize it as anything. I would just say there was a desire to complete a rulemaking. And, as I have mentioned, the target shifted. I wouldn't characterize it as a rush. And I

mentioned this before too, I'm used to working to milestones. And if somebody says I want you to have this done by the end of next week, I'm going to work to that. So, as I said, I wasn't concerned about a milestone that was put on the wall other than needing to bring staff resources to help achieve that milestone.

Q Sure. Is it uncommon for time tables to slip in rulemaking?

A No.

Mrs. Bamiduro. We can go off the record for now.

Thank you.

[Recess.]

Ms. Aizcorbe. It's 3:23. We will resume with what is our final round.

BY MS. AIZCORBE:

Q I wanted to just clean up some of the items that we previously discussed. So I apologize if there's any overlap here. I'll try not to to the best of my ability. When we were discussing about the environmental assessment and the environmental impact statement, we discussed how those NEPA documents were developed in the Army. What I don't believe I had a chance to really flesh out is the discussions that you may have had with your staff about the FONSI. Did you engage in any communications with your staff about the decision?

A My team at headquarters?

Q Correct.

A We didn't talk about the decision once Ms. Darcy had made it.

Q Okay. Were you aware or were your staff aware that a second environmental assessment was in the process of being produced?

A Yes. We were aware that Mr. Owen was working on an EA because he was asking for data about the number of JDs, approved JDs and preliminary JDs. And so I asked for that data to be harvested from our database.

Q Did any of your staff express concern with the FONSI?

A And this is probably just part of our culture, they expressed concern but not in a way that undermines Ms. Darcy's authority.

Q Did you speak to anybody outside of your office, for example, anybody in the Army, about the FONSI?

A Just that it existed. And I asked for a copy of it. And it was part of the documents that were, I believe it was part of the documents that went with the final rule. So it was posted on Army's Web site. So I was pointed there to get it.

Q So you didn't express your concern with the FONSI to anybody?

A It wasn't my place to express that concern because it was a finalized action. And it was Ms. Darcy's decision. So it wasn't something I would have said anything about.

Q Okay. You made several recommendations in your April 24th memo, including reducing the linear foot distance in the definition from 1,500 to 300 feet, adding new criteria such as the 100-year flood plain, and editing the final draft for clarity and simplicity, and that

without these changes, quote, "the final draft cannot be promulgated as a final rule without an environmental impact statement," unquote. Were all of these changes that you had recommended in the final rule?

A No. They weren't.

Q In 2014, the EPA and the Corps promulgated an interpretive rule pertaining to agricultural exemptions in Waters of the U.S. under the Clean Water Act but withdrew the rule shortly thereafter. Are you aware of this interpretive rule?

A Yes.

Q Do you know why the agencies decided to pursue the interpretive rule?

A And that was while Meg [Gaffney-Smith]was chief. The interpretive rule, to my understanding and this was, I had peripheral understanding and involvement in this. So I think that if you want more in-depth understanding, I think talking to Meg will be more beneficial.

But I'll share what I know. That was to enable agricultural producers to have a broader understanding of the existing agricultural exemptions and what was covered by those exemptions. So it is providing an interpretation of those exemptions to the public.

Q Okay. Was it developed with the understanding that it would ultimately become a final formal rule instead of just an interpretive rule?

A I don't think so. But I don't know.

Q Okay. Do you know what science it was based on?

A I don't. I wasn't involved in any of that.

Q The Corps was not involved?

A The Corps was. I just personally wasn't.

Q Okay. So while the interpretive rule was intended to be a part of the WOTUS rulemaking, was it included in the final rule?

A No. My understanding was that when the proposed rule was put out for public comment, the interpretive rule was put out as part of that package and was put out as itself.

Q And then subsequently withdrawn?

A Right. As part of the CR/Omnibus last year.

Q I see. Are you aware of any memos or comments made from the Corps or Army staff raising concerns with the interpretive rule?

A I know that in its development there was a lot of interagency interaction during the development of it. But the detailed substance of that I can't tell you because that was when Meg was chief and I wasn't in the day-to-day interaction there.

Q And you, in your role at that time, didn't have any part in the interpretive rule or the review of the drafting?

A Correct. I was on the periphery.

Q Okay. In the course of the WOTUS rulemaking, did you ever meet or speak with anybody at the Department of Agriculture regarding the interpretive rule or final versions of the WOTUS rule?

A I didn't talk to anybody at Agriculture about the interpretive rule. I was involved in one meeting after the draft final rule was in OMB, that the final rule was in OMB vetting with OMB, EPA,

and I'm trying to remember whether Mr. Schmauder was there, I can't recall, at USDA to discuss the final Waters of the U.S. rule.

Q And was it a general rule where you spoke about the entire final rule? Or were there specific items being addressed at that particularly meeting?

A It was a general discussion and facilitated by OMB.

Q Okay. Were you aware at that time that EPA and Army had had previous meetings with USDA on the rulemaking?

A I wasn't aware of specific meetings that they had had. During that meeting, it was brought up where that sentence in the adjacency paragraph came from, in terms of wanting to make sure that producers weren't automatically jurisdictional as adjacent waters.

Q Okay. So you hadn't received any invitation to those prior meetings with USDA?

A No.

RPTR GENEUS

EDTR HUMKE

[3:30 p.m.]

Q We've spoken a bit today about your memos that were a part of the Peabody memoranda transmitted to Assistant Secretary Darcy, just a few clean-up questions about those memos. Do you believe that the Corps was treated as a coequal in this rulemaking with the EPA?

A No.

Q Would you still consider your positions in the memos to be a valid reflection of the Corps evaluation of the rulemaking?

A Yes.

Q The rule was finalized a mere month after these memos were transmitted, yet, Administrator McCarthy testified before this committee that Jo-Ellen Darcy indicated that all concerns of the Army Corps raised in the memos had been satisfied. And Ms. McCarthy also echoed that these concerns were satisfied. Do you feel as though all the concerns raised by the Corps in these memos were satisfied?

A I think that the technical concerns that were raised in these memos were brought to the attention of the decisionmaker for -- let me rephrase that -- were brought to the attention of the Army decisionmaker. I don't know what else she had in front of her, and I don't know if she shared these with EPA, or if she didn't. From where I stand, the final rule didn't address all of the recommendations that were brought forth in these memos, and it wasn't my expectation

that it would. My purpose in producing these for General Peabody was to make sure that she had all the information from my program standpoint, from the regulatory program standpoint, so that she was fully informed as she made her decision.

Q And why was it your expectation that not all of the concerns in the memos would be addressed in the final rule?

A Because I understand that she has other sources of information, or may have other sources of information, and she's making a policy decision, and I'm providing technical advice and recommendations based on analysis.

Q And is that expectation also because you had experienced some disagreements with the EPA previously on --

A Yes. And I understand that they were likely providing similar analyses and recommendations to their leader.

Q Okay. Did any of the concerns raised in these memos exist with respect to the 2010 Clean Water Act guidance which was redrafted to consider much of the same new science that was in the process of being developed by the EPA?

A Oh, wow. That's -- you know, I didn't go back and reconsider the guidance in terms of the concerns that were raised here, so I don't know how to -- I don't know. That's a good question, though.

Q Okay.

A I may have to contemplate that.

Q Let us know if you have anything.

Mr. MCGRATH. One question on the coequal aspect. Why do you

think that the Corps was not treated coequally with EPA?

Ms. Moyer. I don't know why we weren't treated equally, but I would suggest that we weren't treated equally. I would suggest that it would be fair to say we were treated as other stakeholders were treated.

BY MS. AIZCORBE:

Q Is that your experience with other joint rulemakings with the EPA?

A No. It hasn't been. I would suggest in the development of the joint Army EPA 2008 mitigation rule, that that was not an effort that played out the way this one did. That was definitely one that was also very dynamic, but it was definitely Corps, EPA, Army all together working out their issues, reaching compromise positions and moving forward together.

Q You would say that that was for of a collaborative effort?

A Correct.

Q Okay. Earlier we were discussing the public comments that were brought in and that within the 20,000 -- or 21,000 or so unique comments, there was a group of about 2,000 letters that were specific, and you put those in categories. You were discussing that you made decisions as to whether these letters were positive, negative, or neutral in nature?

A Correct.

Q But that that's not necessarily something that you would have done. Who directed you to make those characterizations?

A Nobody directed me to do that. That was, to me, something that was going to be informative on a very gross scale. If we could make that generalization, we needed to just for that first gross scale consideration of is this comment letter positive or negative. If we did it, we needed to do it, because we were going to be asked that question, positive, negative, or neutral.

Q And I may have misunderstood, but I thought that you suggested that it wasn't necessarily representative of whether the full comment was positive or was negative. Is that correct?

A That's correct. In some, we couldn't categorize.

Q Okay. Was that left out of your analysis?

A No, I think that when we couldn't categorize them, we probably put it in the neutral bucket.

Q Okay. Okay. Earlier we were discussing the connectivity report and when the rule was being drafted by the EPA and/or Army. You said you weren't aware of when it had started -- drafting the final rule. You mentioned that the connectivity report was finalized in November of 2015 and from what I understand the rule went final and was --

A 2014.

Q 2014. Okay.

Okay. So the connectivity report was finalized in November of 2014. That's --

A Yes. Because we are in 2015 now, right?

Q Yes. Okay. It's a little confusing, because on the actual

report it says January of 2015 on the top.

A Okay.

Q So it's not very clear as to when it was actually finalized. And I understand it went through peer review, and there were certain benchmarks that it went through, and I just wanted to clarify when that was actually finished.

A I think -- and I could be mistaken, since that's an EPA product. So I think that's when it was actually finalized.

Q Sure. Do you believe that the final rule was being drafted before -- or, sorry, not the final rule. Do you believe that the proposed rule was being drafted before the connectivity report was finalized?

A Not the proposed rule, but the draft final rule? So the proposed rule went out on public comment. We got all the public comments. The connectivity report wasn't finalized then.

Q Okay.

A It was finalized last winter, so --

Q Okay. So the proposed rule was drafted, at the same time, the connectivity report was in the process of being drafted. Is that correct?

A Right. Right.

Q Okay. The proposed rule went out for public comment. At that point in time, the connectivity report was not yet finalized?

A Correct.

Q Correct. The public comment period closes -- I'm just

trying to get an idea of the timeline here.

A I'm glad you're doing this, because it's confusing.

Q The public comment time closes, and then the connectivity report is finalized somewhere between that time and when the draft final rule goes to inter-agency review?

A Yes.

Q At the same time when the connectivity report is being finalized, somewhere in that window, the draft final rule is also beginning to be --

A Yes.

Q Okay. So a lot of these things overlap. Do you have any understanding why EPA thought it would be prudent to move forward with a rulemaking based on a scientific product that was not yet finalized?

A I don't know why that decision was made other -- I would have to speculate on why that decision was made.

Q Okay. You, in, I believe it was one of the minority's hours, were discussing how the team of eight meetings had stopped for a period of time. There were some disagreements at the inter-agency table. Do you know if anybody specifically directed that those meetings stop? I may have missed something.

A No, I don't know that they were directed to stop.

Q Okay. Who generally scheduled those meetings?

A I got the meeting invites from Mr. Schmauder.

Q Okay. Was anybody at the EPA an equal partner in scheduling or creating an agenda for these meetings that you know of?

A Mr. Peck.

Q Mr. Peck. So Mr. Peck and Mr. Schmauder essentially ran these meetings?

A Yes.

Q Okay. I think I just have one more.

We were discussing the timeline of the rule, and I was a little confused as to how you all were able to conduct all of your review of the public comments in such a short period of time compared to how long it has taken you to do similarly situated rulemakings in the past. And we got to the point where I asked you whether you believed politics played a role in the timeline and why the rule seemed rushed. And you said that there was an appearance that politics played a role. Why do you feel that way? Were there any specific indicators that made you feel that way?

A And I guess I would say I feel that way partly because the timeline shifted, although not surprising to me that the timeline shifted.

Q Shifted longer or shorter?

A Longer. So first, it was January, then it was spring. So I guess that's why I would say that, usually when I have an internal milestone established by the Corps, so usually a general -- that timeline is, it doesn't shift unless I say, I've lost resources to be able to work on this. And that, to me, shifting it to, oftentimes, the consternation of my senior leaders.

But when something external shifts the timeline, and it's more

of an ambiguous shift, so -- but I don't know why the timeline shifted.

Q Were you prepared from the Corps perspective to produce on the original timeline before it was shifted?

A The products that we were being asked to produce, meaning the analysis of the comments, the analysis of the isolated waters, JDs, had brought in resources to enable us to do what we needed to do to inform those external analyses.

Q So the change in the timeline or these shifts were not a product of you requesting an extension?

A That's correct.

Q Okay.

BY MR. MCGRATH:

Q I just have a few more final questions here, so it shouldn't take too long.

One thing that -- and I wasn't here for this. I was meeting with the chairman, actually. But at one point I think you talked about that it would be speculative to talk about whether someone's duties had been changed based on these memos being made public.

I don't want you to get into speculation, but do you have someone else who it would be worth us talking to, someone else who would be more knowledgeable about something of that nature?

A I think talking to Chip would be. I think he could talk to you about that circumstance.

Q Okay. Were you able to watch Assistant Secretary Darcy's testimony before the Transportation Infrastructure Committee?

A Yes. We had a bit of a feed problem --

Q Okay.

A -- so some of it, I think, we missed, but we saw most of it, yes.

Q Is there anything in there that you would disagree with?

A I think some of the technical representations she made about the specifics of the rule, because I'm a very wonky regulatory person, I would, but other than that, I didn't balk at anything that she said.

Q Okay. Did you see secretary -- or Administrator McCarthy's testimony before our committee?

A I did not.

Q Okay. You talked a little bit about how this -- generally, I think I could say, and tell me if I'm putting words in your mouth or anything, that the relationship has been good for other rulemakings and this is somewhat of a different relationship between Army Corps and EPA related to this rulemaking compared to other rulemakings in the past?

A I would characterize that this rulemaking wasn't as collaborative among the three parties as other rulemakings, joint rulemakings, in the past have been.

Q Okay. In a larger sense, how do you think that the kind of split jurisdiction that the Clean Water Act has put in place is working?

A I think that the implementation of the Clean Water Act as a whole between EPA and Army, I think we do a good job managing that

inherent dynamic friction that is established with the Corps responsible for the day-to-day implementation of the 404 program with EPA oversight of how we do that.

Q Yeah.

A I think that both agencies are staffed with extraordinarily competent professionals, and although there are rubs sometimes, because we don't agree on certain things, we work it out. And I think that nearly 100 percent of the time there is phenomenal delivery of that program to the regulated public.

Ms. Aizcorbe. Quickly, let me jump in.

Mr. MCGRATH. Sure.

BY MS. AIZCORBE:

Q On that note, when we're regarding specifically the Corps relationship with the Army, because you did mention there were some policy changes or standard processes that were changed in this rulemaking, such as Army conducting the NEPA document, and we discussed Mr. Schmauder being an attorney from Army OGC drafting the rule and the guidance, were you ever explained as to why some of these changes were made?

A I do understand why the EA was drafted by Army. That was because of workload issues. And that was a volunteer --

Ms. Fraser. I'm sorry. Can you clarify which EA?

Ms. Moyer. Oh, the environmentalassessment -- sorry. I was clarifying your words. Sorry about that.

Ms. Aizcorbe. No, that's fine.

Ms. Moyer. And I don't have a clear understanding of Mr. Schmauder's involvement. I will say, I don't think I'm owed that explanation, so I just accept based on Ms. Darcy's office's role in all this, when she sends people, I liaise with those people.

Q Okay.

BY MR. MCGRATH:

Q You talked about the 404 process, generally. What role do you and your team have in that process, the 404 permitting process? Is that handled by the local areas, or do you handle that at the national level?

A All permit authority is delegated to district engineers. So all of those decisions are made at the district office level. So at the divisions, they are providing kind of that quality control, quality assurance piece, and monitoring consistency among the districts. And then at the headquarters' level, we're doing that overall program oversight and management and providing policy guidance interpretations and then also overseeing budget execution, development and execution.

Q Okay. So it's mainly going to be at the local level you are dealing with the actual application process --

A Absolutely, yes.

Q -- that type of thing? Okay.

But, however, you said earlier I think you are working on the nationwide permit aspect?

A Right. The nationwide permits are issued at the

headquarters' level. So that being package right now has just started OMB and inter-agency review. And they are rules, so that's a rulemaking process.

Q And that happens usually every 5 years? Is that correct?

A Every 5 years.

Q Okay. And so the last one was 2012?

A Yes.

Ms. Aizcorbe. Is that also joint with the EPA or --

Ms. Moyer. No.

Ms. Aizcorbe. -- or is that just a Corps rulemaking?

Ms. Moyer. That's just Corps rulemaking.

BY MR. MCGRATH:

Q And so the timeframe for this would be the 2017 timeframe?

A This is another timeline. So the draft proposal is in OMB review right now. We hope to finish up inter-agency review in March-ish and get it out in the Federal Register for public comment, because you need public comment review, review and assess those comments for a 4-month period and get it back to OMB in September 2016 timeframe to publish a final rule in December of 2016.

Q Okay. Has there been any discussion of using any of the language that has been in the WOTUS rulemaking in the nationwide permit rulemaking to expand using the nationwide permit rulemaking to expand --

Ms. Navaro. Can I just say that this seems a little bit beyond the broad scope of things related to the WOTUS rulemaking.

Ms. Aizcorbe. We're asking about WOTUS language.

Ms. Navaro. Right, but the nationwide language permit effort is completely separate.

Ms. Aizcorbe. We don't have any germaneous rules in the committee. I mean, if Ms. Moyer doesn't care to answer the question, then we don't have to discuss it, but it is germane to the WOTUS rulemaking, so that's why we're interested in it.

Ms. Moyer. So in our package that's with OMB right now, we have not included WOTUS-specific language recognizing that depending on the outcome of the litigation, we may have language that we have to make sure that doesn't conflict. So we have tweaked language to make sure that we will have workable nationwide permits depending on the outcome of the litigation. So we didn't go into it blindly saying, WOTUS -- Clean Water Rule exists or it doesn't exist. So that's how we've addressed that.

BY MR. MCGRATH:

Q Okay. That makes sense. A couple of other things, and these may be a little off topic, but we know you're here; we have multiple investigations going on, if it's not comfortable answering, we understand, but did you or your office have any input into the 2008 stream buffer zone rule done by the Department of the Interior?

A No. I'm going to have to ask you, is that the stream protection --

Q This is an earlier version of it, but there's a new one now.

A Okay. I know that we reviewed and provided comments, but

it wasn't an effort like this.

Q An effort, okay.

A Yes. And in the previous version and the current one, it was the same, we provided comments.

Q Okay. One thing more about your job duty. Does your office have anything to do with the Army Corps contracting process, or is that dealt totally separately?

A That's --

Q Totally separate. That's what I thought. That's what I assumed, but I --

Mr. MCGRATH. Okay. I think that's all I have. Do you have any further follow up?

Ms. Aizcorbe. No, besides thank you.

Mr. MCGRATH. Go off the record.

Ms. Moyer. Thank you.

[Recess.]

BY MRS. BAMIDURO:

Q Can you hear me?

A Yes.

Q Okay. So I thought I understood you said in the last hour before the break that it was not uncommon for timelines to shift in rulemaking. Is that right?

A That's right.

Q Do you know the basis for the timeline shifting in this rulemaking?

A No, I don't.

Q So, then, what leads you to say that you thought politics was involved?

A My basis for saying that was, is when it's an internal Corps milestone that is set, typically, by a military officer, they don't shift unless I say due to resources, I can't meet that milestone. So that is complete supposition on my part. It may not have been politics. I don't know what it was.

Q Do you have any reason to know whether politics, in fact, was --

A No.

Q -- the impetus behind the timeline shift?

A No, I have no reason to.

Q Do you have any reason to believe that Assistant Secretary Darcy would enter into a rule that she did not support?

A I have no reason to believe that she would do that, no.

Q Do you have any reason to believe that Ms. Darcy was pressured into entering -- excuse me -- into entering into this rulemaking? That was a mouth full.

A No, I don't know any of the inner-workings of her office other than my interaction with her on a technical basis.

Q Do you have any reason to believe that the final rule does not, in fact, reflect the Army's view?

A No. In fact, I've heard her say exactly the opposite.

Q You mentioned just a few moments ago that you did not think

that this particular rulemaking was as collaborative as other rulemakings. What's your basis for making that statement?

A The basis for making that statement is the fact that in other rulemakings there was Corps Army interaction on joint rulemakings. Corps Army interaction at every juncture. There were not meetings among staff, and by that I mean between Mr. Schmauder and Mr. Peck to discuss substantive issues that did not include the technical members of the Corps or other technical members of EPA, that those members of EPA had communicated to me that they weren't included in some of these discussions as well.

And I'm not saying whether it's appropriate or inappropriate. I'm just saying in previous joint rulemaking efforts, there were those meetings throughout the process. And in this rulemaking effort, those collaborative meetings ended. And when they reconvened, they were sporadic, and then they ceased again.

And I think that this process could have been more collaborative, even if at any point in time there was a communication to the Corps or to EPA, hey, a policy decision on this matter has been made, it's off the table, now we're only discussing this body of issues.

Q Do you have any reason to believe that the Army was at any point shut out of the collaborative process in developing this rule?

A I have no information on that one way or the other.

Ms. Fraser. And as far as you know, Mr. Schmauder, in his deliberations and collaborations, with the EPA would report to the assistant secretary?

Ms. Moyer. I don't know if he did or did not.

Mrs. Bamiduro. Okay.

Mr. MCGRATH. Okay, we can go off.

[Whereupon, at 3:55 p.m., the interview was concluded.]

Certificate of Deponent/Interviewee

I have read the foregoing ____ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

_____

Witness Name

_____

Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	)	Civil No. 3:15-cv-00059-DLH-ARS

PLAINTIFF STATES' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This Court should grant Plaintiff States' Motion for Summary Judgment because the WOTUS Rule violates the Agencies' authority under the Clean Water Act (CWA), the United States Constitution, and the procedural and substantive provisions of the Administrative Procedure Act (APA) and National Environmental Policy Act (NEPA). In doing so, this Court should again reject the Defendants', U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, Agencies), claims that this matter is not prudentially ripe for adjudication, which merely recycles arguments this Court already rejected when it refused to stay this case. This litigation concerns a "final agency action" promulgated by the Agencies over three years ago and which "remains on the books" and thus should not be placed in limbo while the Agencies pursue efforts that may – or may never – repeal, rescind, or otherwise modify the "Clean Water Rule: Definition of 'Waters of the United States'" (the WOTUS Rule), 80 Fed. Reg. 37054

(June 29, 2015). Given the Agencies' longstanding delay in addressing the WOTUS Rule's many legal infirmities, a substantive ruling from this Court on the WOTUS Rule is needed.

The Agencies decline to defend the WOTUS Rule, and Sierra Club and the Society of Wetland Scientists (Amicus) now solely try to defend the Rule. Sierra Club and Amicus (which are not owed any *Chevron* deference) ignore the clear text of the CWA and applicable Supreme Court decisions, and instead focus on the unremarkable proposition that there is a connection between upstream and downstream waters, a proposition that is unrelated to the legal test of what constitutes "navigable waters" subject to federal jurisdiction under the CWA. That water flows downhill cannot confer federal jurisdiction over everything the Sierra Club and Amicus claim as upstream waters. Ultimately, Sierra Club and Amicus seek the imposition of federal regulation of nearly all waters and associated land in the United States – an outcome that is contrary to the CWA's express mandate in Section 101(b) (33 U.S.C. § 1251(b)) to preserve and protect the "primary" responsibilities and rights of States to manage their own water resources.

The Agencies' argument that any challenge to their authority over interstate waters is time-barred overlooks the fact that they broadened the scope of federal jurisdiction in the WOTUS Rule by tying the unlawful definitions of adjacent, tributary, and case-by-case waters to non-navigable interstate waters. The administrative record also clearly contradicts both Sierra Club's and the Agencies' claims that the WOTUS Rulemaking complied with the APA, and the Agencies' claim that the WOTUS Rulemaking complied with NEPA.

Plaintiff States respectfully urge this Court to address the merits of their claims in their Memorandum in Support of Motion for Summary Judgment and herein, and permanently set aside the WOTUS Rule as exceeding the Agencies' authority under the CWA and the U.S. Constitution, and in violation of the APA and NEPA.

STANDARD OF REVIEW

No defense of the WOTUS Rule is due any deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). When an "agency no longer seeks deference" for parts of an agency action, "it would make no sense for th[e] court to determine whether the disputed agency positions . . . warrant *Chevron* deference," especially not "when the agency has abandoned those positions." *Glob. Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 407–08 (D.C. Cir. 2017). When an agency offers no interpretation in support of a regulation, the court must decide for itself the best reading of the statute. *Id*. at 408. Further, when an agency action raises serious constitutional questions, deference to an agency interpretation is inappropriate and "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency N. Cook Cty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001) (citing *Edward J. DeBartolo v. Florida Gulf Coast Bldg. and Const. Trades Council,* 485 U.S. 568, at 575 (1988)).

The Agencies have explicitly chosen *not* to defend the WOTUS Rule[1] and instead stated they "have proposed a repeal of the [WOTUS] Rule and are actively reconsidering many of the substantive questions" raised by the Plaintiff States, and thus "take no position on . . . substantive objections to the [WOTUS] Rule." Dkt. No. 224, at 2, 38; *see* Recodification of Preexisting Rule, 83 Fed. Reg. 32227 (July 12, 2018) (Proposed Recodification Rule). The Agencies have now questioned the basis for the WOTUS Rule, stating that the Rule "exceeded the agencies' authority under the CWA," is "inconsistent with important aspects of *Rapanos*," "cover[s] waters outside the scope of the [CWA]," and "[a]t a minimum . . . is not compelled and raises significant legal

[1] Further, to the extent the Agencies defend the WOTUS rulemaking on procedural grounds, they are not construing the statutory text of the CWA and are not due any *Chevron* deference.

questions." 83 Fed. Reg. at 32228 (discussing *Rapanos v. U.S.* 547 U.S. 715 (2006)). Congress did not delegate to Sierra Club and Amicus, private non-governmental organizations, the authority to administer the CWA, and their views are obviously not due any *Chevron* deference.

ARGUMENT

I. The WOTUS Rule Is Ripe For Adjudication On The Merits

Once again, the Agencies ask this Court to refrain from deciding the merits of the WOTUS Rule, reiterating arguments already rejected by this Court when the Agencies sought to continue the 2016 stay of these proceedings. This Court decided then that this case is ripe for adjudication and issued an Order on March 23, 2018 lifting the 2016 stay. Dkt. No. 185, 199. Further, other District Courts are not delaying consideration of the WOTUS Rule. A federal district court in Georgia has rejected the Agencies' effort to delay, granting a preliminary injunction against the WOTUS Rule and noting that the Supreme Court had "explicitly stated that this case is presently justiciable." *Georgia. v. Pruitt,*, 2:15-cv-79, Dkt. No. 174, at 9, n.6 (S.D. Ga. June 8, 2018). Motions to preliminary enjoin the WOTUS Rule are also under advisement in the U.S. District Court for the Southern District of Texas. *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.).

The only procedural development since this Court's March 23 Order lifting the 2016 stay is that on July 12, 2018, the Agencies published a revised and supplemental proposal updating the Agencies 2017 proposal to repeal the WOTUS Rule. *See* 82 Fed. Reg. 34899 (July 27, 2017); 83 Fed. Reg. 32227. This development reinforces Magistrate Judge Senechal's observation that, "[r]ecodification or replacement of the WOTUS Rule cannot be considered a foregone conclusion," and "whether that will occur, and when that might occur, cannot be known." Dkt. No. 185, at 15. A year after the original 2017 proposal, the Agencies are still seeking additional

public comment and the status of the Agencies' efforts to revise or replace the WOTUS Rule are even more uncertain now than they were when this Court lifted the 2016 stay.

With the recent publication of the supplemental proposal, the Agencies have re-initiated the public comment period, effectively putting the process to potentially finalize the Proposed Recodification Rule even more behind schedule than when this Court rejected the Agencies' earlier efforts to delay this litigation. When – and if – the Agencies may finalize any rule significantly revising or replacing the WOTUS Rule is unknown. Putting this litigation on hold now (after merits briefing) would allow the Agencies to "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way." *Id.* at 15 (quoting *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012)). All the while, Plaintiff States will "indeed be prejudiced by delaying the litigation," as the Agencies' current final rule delaying the effective date of the WOTUS Rule (83 Fed. Reg. 5200 (February 6, 2018)) (Delay Rule) faces invalidation at any time. *Id.* at 16.

The Agencies also recycle the assertion (again, already rejected by this Court) that they face more uncertainty if this Court rules on the WOTUS Rule in the midst of their voluntarily extended proposed reconsideration process. The opposite is true: a decision by this Court will provide certainty regarding the scope of the Agencies' jurisdiction under the CWA. The Agencies' suggestion that any final Recodification Rule will introduce certainty is misplaced. If any final Recodification Rule is ever promulgated, it will be challenged just as the Delay Rule is currently being challenged in many jurisdictions. *See New York, v Pruitt,*1:18-cv-01030 (S.D.N.Y.); *Nat. Res. Def. Council v. EPA*, No. 1:18-cv-1048 (S.D.N.Y.); *South Carolina Coastal Conservation League v. Pruitt*, No. 2:18-cv-330 (D.S.C.). Lastly, the Agencies could change or even reverse their current course at any time with another proposed rulemaking (or another supplement to the

existing one). While they may not like the outcome, it is a decision on the merits here – and not months or years of additional rulemaking proceedings – that will introduce the certainty the Agencies claim to seek.

The Agencies' assertion that Plaintiff States face no harm if this litigation is stayed has been rejected not only by this Court, but also the Supreme Court, which observed that "the WOTUS Rule remains on the books for now, the parties retain " 'a concrete interest' " in the outcome of this litigation," which remains "true even if the agencies finalize and implement the [Delay Rule]." *Nat'l Ass'n of Mfrs. v. Dep't of Defense,* 138 S. Ct. 617, 627 n.5 (2018) (internal citations omitted). The Plaintiff States face the "non trivial" (Dkt. No. 185 at 16) possibility that the Delay Rule will be struck down, reinstating the WOTUS Rule. The Agencies could also publish a final Recodification Rule that fails to adequately address all the legal deficiencies of the WOTUS Rule, creating a situation in which Plaintiff States will have to challenge the Agencies' regulations anew.

The current situation is simply chaos, and it cries out for judicial guidance on the legality of the existing WOTUS Rule. It "is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137, 177 (1803). A hypothetical possibility of mootness at some uncertain point in the future is no reason for this Court to now refuse to fulfill its "virtually unflagging" obligation to exercise its jurisdiction over this case. *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1384 (2014).

II. The WOTUS Rule Violates The Clean Water's Statutory Language And Supreme Court Precedent

Sierra Club misconstrues the CWA's clear statutory language, and mischaracterizes applicable Supreme Court precedent. Sierra Club's references to key Supreme Court decisions clarifying the limits of what constitutes navigable waters under the CWA do not accurately reflect

the Supreme Court's criteria, and perhaps more important, carefully fail to admit what those cases held. One could read Sierra Club's response and come away with the mistaken impression that the Agencies had won rather than lost the landmark *SWANCC* and *Rapanos* cases. *SWANCC* rejected a Corps rule asserting jurisdiction over isolated, intrastate ponds because the ponds were used by migratory birds, holding that "nonnavigable, isolated, intrastate waters," such as seasonal ponds, "*not* adjacent to open water" were not WOTUS. *SWANCC*, 531 U.S. at 169, 168 (the Court also notably refused to exercise *Chevron* deference in that case, *id.* at 172-73). In *Rapanos*, both Justice Scalia's plurality and Justice Kennedy's concurrence held that the Corps could not regulate wetlands far removed from navigable-in-fact waters, including those wetlands adjacent to ditches and drains that the Corps considered tributaries of navigable waters. Yet the Sierra Club asserts that jurisdiction is proper over the same types of isolated land and water features that the Supreme Court rejected in *SWANCC* and *Rapano*s.

Sierra Club wrongly claims that Plaintiff States failed to follow Eighth Circuit precedent holding that Justice Kennedy's concurrence is a controlling opinion in *Rapanos*. To the contrary, Plaintiff States' opening brief acknowledged that the "8th Circuit Court of Appeals has held that the Agencies may assert CWA jurisdiction under either the plurality or the concurrence in *Rapanos*." Dkt. No. 212 at 16 n. 10 (citing *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009)). Plaintiff States also devoted an extensive portion of their opening brief establishing that the WOTUS Rule violated the CWA under either Justice Kennedy's concurrence or Justice Scalia's plurality, often citing both opinions. *See* Dkt. No. 212 at 17-25.

Sierra Club also wrongly claims that Plaintiff States misapplied Justice Kennedy's concurrence by stating the significant nexus test requires a "chemical, physical, *and* biological" connection to qualify a water as significant. Dkt. No. 223 at 32 n.10. Yet that is exactly what

Justice Kennedy's concurrence and the CWA state. Reading the plain language of the CWA, Justice Kennedy rejected connections between waters that "are speculative or insubstantial" as they "fall outside the zone fairly encompassed by the statutory term 'navigable waters.' " 547 U.S. at 780. Instead, Justice Kennedy required a nexus to "be assessed in terms of the [CWA's] goals and purposes to maintain the "chemical, physical, *and* biological integrity of the Nation's waters." *Id* (emphasis added) (citing 33 U.S.C. § 1251(a)). Clearly, the "significant nexus" test is based on the relationship between a water body in question and navigable-in-fact waters, not a potential polluting activity, which is irrelevant to the analysis. Thus the Sierra Club's focus on potentially polluting actions, rather than the relationship between upstream waters and navigable waters, is misguided. The "significant nexus" test acts as a gatekeeper for determining when federal jurisdiction may be appropriate over waters *other than* navigable-in-fact waters or waters readily susceptible of being rendered so. Requiring a heightened standard for waters at the outer edge of Congress's and the Agencies' CWA authority is reasonable and exactly what Justice Kennedy intended in using language from section 1251(a).

The WOTUS Rule goes in the opposite direction from Justice Kennedy's test, declaring waters and related lands subject to federal jurisdiction when triggering any single "function" of the nine identified under the WOTUS Rule. 33 C.F.R. § 328.3(c)(5). In contrast, Justice Kennedy's test requires that the Agencies "identify categories of tributaries that . . . are significant enough . . . in the majority of cases . . . to perform *important functions* for an aquatic system incorporating navigable waters." 547 U.S. at 781 (emphasis added). The WOTUS Rule allows any one function – no matter how remote or tenuous the connection to navigable-in-fact waters – to establish a "significant nexus" and therefore violates Justice Kennedy's significant nexus test.

Sierra Club also misinterprets Justice Kennedy's use of the term "categories" in the above quoted passage from *Rapanos*, claiming that "Justice Kennedy made clear that water bodies . . . on a categorical basis . . . c[an] be protected." Dkt. No. 223, at 15. But, Justice Kennedy's statement in his concurrence in *Rapanos* was made in the context of discussing the Supreme Court's decision in *Riverside Bayview.* Justice Kennedy noted that jurisdictional categories could be appropriate for "wetlands adjacent to *certain major tributaries*," and that the Agencies could "identify *categories* of *tributaries*" that were "similarly situated" under his significant nexus test. *Rapanos,* 547 U.S. at 780-81 (emphasis added) (discussing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). Justice Kennedy's concurrence was clearly directed at discrete, localized areas, and not intended for blanket national application. *See, e.g. Orchard Hill Bldg. Co. v. United States Army Corps of Eng'rs,* 893 F.3d 1017, 1026 (7th Cir. 2018) (denying the Corps' categorical determination of adjacency for 165 wetlands in proximity of a creek, noting "[t]he significant nexus test has limits: the Corps can consider the effects of in-question wetlands only with the effects of lands that are similarly situated," and that considering the effects of land without "showing or explaining how that land is in fact similarly situated [] is to disregard the test's limits").

Sierra Club ignores the fact that Justice Kennedy's concurrence is plainly based on the Supreme Court's decision in *SWANCC,* which still requires that the term " 'navigable' has at least the import of showing us what Congress intended as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172.

III. The WOTUS Rule Is Not Supported By Science

Sierra Club and Amicus claim that "science" supposedly supports the WOTUS Rule and in doing so sidestep the central truth that determining the limits of federal jurisdiction is ultimately a legal conclusion. *See* Dkt. No. 233, at 16-26; Dkt. No. 233, generally; *see also* Connectivity Of Streams And Wetlands To Downstream Waters: A Review And Synthesis Of The Scientific Evidence, ID-20859;[2] 80 Fed. Reg. 2100 (Jan. 15, 2015) (Connectivity Study). Sierra Club and Amicus make the same error the Agencies made in promulgating the WOTUS Rule – failing to acknowledge that the Connectivity Study shows only the connection, and not the significance of the connection, of upstream waters to downstream *navigable* waters.

Congress enacted the CWA under its constitutional Commerce Clause authority, basing federal jurisdiction on "navigable waters." A "scientific report" does not determine what is legally jurisdictional under the CWA. For example, a scientist might conclude that a watering hole separated from a navigable water by many dry tributaries is connected because migratory birds might breed or rest in the watering hole on their way to the navigable-in-fact water. But, that scientific analysis does not transform the watering hole into "navigable waters" under the CWA (an interpretation rejected by the Supreme Court in *SWANCC*). Sierra Club and Amicus seek to transform the "everything-is-connected-to-everything" nature of the Connectivity Study into a justification for federal jurisdiction, fundamentally distorting Justice Kennedy's significant nexus test.

Justice Kennedy's test in *Rapanos* focuses on the "significance" of the "nexus" between an upstream water and a downstream "navigable water." 547 U.S. at 780. Waters with

[2] Plaintiff States use the same convention for citing to the Administrative Record as in their opening Memorandum in Support of Motion for Summary Judgment, Dkt. No. 212 at 7 n.4.

"speculative or insubstantial" connections are not fairly encompassed by the CWA. *Id.* Sierra Club's and Amicus' responses are full of loaded descriptors for the relationships the Connectivity Study describes between upstream and downstream waters such as: "strong influence," "cumulative," "highly connected," "strong and extensive connections," "functionally related," "heavily influenced," "strong influence," and "extensive connections." Dkt. No. 223 at 8, 18, 23, 25, 30; Dkt. No. 233 at 10, 14, 16. These descriptors fail to support how, or when, the connection (or nexus) between an upstream water and a downstream navigable water is significant – as required by Justice Kennedy's *Rapanos* concurrence.

Justice Kennedy rejected CWA jurisdiction over all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776; *see also id.* at 769 ("merest trickle, [even] if continuous" is insufficient). Justice Kennedy also rejected the Corps' "theory of jurisdiction," based on any "adjacency to tributaries, however remote and insubstantial." *Id.* at 780. Yet Sierra Club asserts that any of these sort of connections, as well as situations where the purported connections are even more remote, justify the imposition of federal jurisdiction. It is exactly these type of claims, "which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," that Justice Kennedy rejected. *Id.* at 781.

Amicus' contention that the definition of "connectivity" in the Connectivity Study satisfies the legal threshold of the "significant nexus" test falls flat. Dkt. No. 333, at 15-16. Amicus acknowledge that the significant nexus test "depends on the extent of [] connectivity with [navigable waters]," but then fail to show how the Connectivity Study focuses on a connection with actual navigable waters. *Id.* Amicus ultimately admit that "scientists and lawmakers use different language", and that "[t]he scientific literature does not use the term "significant" as it is

defined in a legal context, but [] does provide information on the strength of the effects . . . of the *downstream* water bodies." *Id.* (emphasis added) (citing RTC Topic 9, 23, ID-20872). The Connectivity Study itself admits that "policy terms" such as "significant nexus," "traditional navigable waters" and "other waters" are terms that lack "scientific definition or are defined differently in scientific usage." Connectivity Study at 1-2, ID-20859. These statements confirm the Connectivity Study's failure to address the requisite *significance* of a connection to *navigable waters*.

Finally, neither the Agencies, Sierra Club, nor Amicus address the fact that the Connectivity Study provides no support for the arbitrary distance-based criteria imposed by the WOTUS Rule to define adjacent and tributary waters as jurisdictional. The Agencies themselves acknowledged that "[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters . . . it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA." RTC, Topic 9, 21, ID-20872. Amicus devote extensive discussion to why floodplains, ordinary high water marks, and high tide lines are good indicators of connectivity between waters, but fail to discuss or support how the arbitrary distance markers chosen (100 feet, 100-year, 1500 feet) are indicative of a "significant" connection as compared to any other arbitrary distance numbers. *See,* Dkt. 233 at 20-30. Whatever the Connectivity Study may support, it does not support the notion that waters (and associated lands) within 100 feet of the ordinary high water mark, the 100-year flood plain, or 1,500 feet of the ordinary high water mark of a navigable water have automatically met Justice Kennedy's significant nexus test.

IV. The Plaintiff States' And Plaintiff-Intervenor's Challenge To The Agencies' Assertion Of Jurisdiction Over Non-Navigable Interstate Waters Is Timely

The Agencies argument that Plaintiff States' interstate arguments are time-barred fails, as the Agencies clearly reopened a discussion of their authority over non-navigable intestate waters in the proposed WOTUS Rule, and increased the jurisdictional scope of non-navigable interstate waters in the final WOTUS Rule.

First, the Agencies' unequivocally opened the WOTUS Rulemaking with a discussion of their authority over interstate waters. *See,* 79 Fed. Reg. 22188, 22254-59 (Apr. 21, 2014) ("Proposed Rule") (dedicating five pages to a discussion of the Agencies historic assertions of jurisdiction over interstate waters). Second, the Agencies expanded their authority over non-navigable interstate waters when they tied the WOTUS Rule's new and unlawful jurisdictional categories and new definition of adjacency to non-navigable interstate waters, opening the issue to judicial review. Dkt. No. 208 at 8. The Agencies commented on and fundamentally changed the jurisdictional reach of non-navigable interstate waters, and any review of the WOTUS Rule should address the Agencies' jurisdictional overreach.

V. The WOTUS Rule Violates The National Environmental Policy Act

The Agencies dispute Plaintiff States' NEPA claims, arguing that the WOTUS Rule is exempt from NEPA review under 33 U.S.C § 1371(c)(1), which exempts the EPA, but not the Corps, from NEPA review.[3] For their contention, the Agencies cite *In re United States Department of Defense*, 817 F.3d 261 (6th Cir. 2016) and *Municipality of Anchorage v. United States*, 980 F.2d 1320 (9th Cir. 1992). *Department of Defense* only comments in passing *dicta* – in the context of reviewing language in 33 U.S.C. § 1369(b) – that the WOTUS Rule "represents action, in substantial part, of the Administrator [of EPA]." 817 F.3d at 273. Nowhere in the

[3] Sierra Club, typically an advocate of strict NEPA compliance, is notably silent on the Agencies' failure to comply with NEPA.

opinion does *In re U.S. Dep't of Def.* discuss section 1371(c)(1), so the opinion does not establish that the WOTUS Rule is not a major Federal action. *Municipality of Anchorage* dealt with whether a Memorandum of Agreement (MOA), adopted jointly by the EPA and Corps under their CWA section 401(b)(1) authority, qualified for the section 1371(c)(1) exemption. *See* 980 F.2d at 1328. Unlike the MOA in *Municipality of Anchorage,* the WOTUS Rule is a vastly more significant undertaking with the Corps, not just assisting with minor portions of the Rule, but actively participating in all stages of the Rule's development and promulgation. *See* 79 Fed. Reg. at 22188; 80 Fed. Reg. at 37054 (holding out the proposed and final WOTUS Rule as a joint publication by the EPA and Corps).

The Corps has a vital role in administering the CWA, with primary responsibility for the section 404 permitting program. *See* 33 U.S.C. § 1344. Congress was fully aware of the dual role played by the EPA and the Corps under the CWA, and could have opted to exempt both agencies from NEPA's requirements. Section 1371(c)(1)'s exemption should not apply to the WOTUS Rule because it was a joint venture between the EPA and Corps.

CONCLUSION

For the reasons stated in their Memorandum in Support of Motion for Summary Judgment and herein, Plaintiff States submit that the WOTUS Rule should be permanently enjoined and set aside. Plaintiff States also renew their request for oral argument.

Respectfully submitted this 30th day of July, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 30th, 2018, a true and correct copy of the **PLAINTIFF STATES' REPLY IN SUPPORT OF MOTION FOR SUMMARY** was served via the Court's CM/ECF system.

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November 14, 2014

Submitted Electronically Via Regulations.gov

Water Docket
United States Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments of the State of North Dakota on the Proposed *Definition of Waters of the United States* (Docket ID No. EPA-HQ-OW-2011-0880)

Dear Administrator McCarthy:

The Governor, Attorney General, North Dakota Agriculture Commissioner, North Dakota State Engineer, North Dakota Department of Transportation, North Dakota Department of Health, and North Dakota Industrial Commission (collectively North Dakota) respectfully submit these comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) proposed *Definition of Waters of the United States* (WOTUS), published on April 21, 2014 (79 FR 2218).

The North Dakota Department of Agriculture is the lead state pesticide agency. The department also provides: a fertilizer program, pesticide enforcement, a pesticide water quality program, and a state Waterbank program that helps producers conserve water on their lands and promote water quality. By working with producers through our programs, we aim to monitor water quality and prevent pollution from pesticides.

The North Dakota State Water Commission (NDSWC) is responsible for water management and development throughout the State. The State Engineer is the secretary and chief engineer of the State Water Commission. Additionally, the State Engineer regulates water appropriation, dikes and dams, drainage, and sovereign lands.

The North Dakota Department of Transportation's mission is to safely provide for the movement of people and goods throughout the state. The construction, operation, and maintenance of transportation facilities necessarily impacts water resources and drainage.

The North Dakota Department of Health (NDDH) is the agency charged with implementing and enforcing the State's various environmental regulatory programs, including the federal Clean Water Act (CWA) programs. The Department also implements and enforces state laws relating to the protection of state waters – which is all water, including groundwater.

The Legislature created the North Dakota Industrial Commission (NDIC) in 1919 consisting of the Governor, Attorney General and the Agriculture Commissioner, to conduct and manage, on behalf of the State, certain utilities, industries, enterprises, and business projects established by state law. In addition the NDIC, through the Department of Mineral Resources, has regulatory authority over oil and gas, coal exploration, geothermal resources, paleontological resources, and subsurface minerals, including Class II, Class III, and potentially Class VI (primacy pending) injection wells.

North Dakota has reviewed the proposed rule and draft scientific assessment, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*[1] and *Scientific Evidence: Overview of Scientific Literature on Aquatic Resource Connectivity and Downstream Effects*.[2] North Dakota has serious concerns with the proposed rule's attempt to expand federal authority. The proposed rule would bring under federal jurisdiction waters that have traditionally been solely within the authority of states. This expansion of federal authority into areas of state control is neither legally nor scientifically justifiable.

Moreover, federal regulation of all waters is not necessary. Waters outside the scope of federal jurisdiction are already being regulated and protected by states. Federal regulation will not result in increased environmental benefits; it will only lead to increased confusion.

The State's position is that defects in the proposed rule are so extensive that EPA and the Corps must withdraw the proposed rule. Before re-proposing a rule defining WOTUS, EPA and the Corps should consult with the state co-regulators and officials knowledgeable in agriculture, water management, and water quality issues. Any such rule should bring clarity, not confusion, and be workable for state agencies and industries.

North Dakota has the following additional specific comments on the proposed rule:

1. The proposed rule is an unlawful incursion on state jurisdiction.

The proposed rule is an inappropriate and unlawful federal incursion on state jurisdiction and poses a serious threat to state and individual interests through federal over-regulation and overreach. The proposed rule redefines virtually all surface waters as WOTUS. While there are a few claims of exemptions and exclusions (groundwater, upland ditches, etc.), they are confusing and nearly meaningless under the proposed rule.

The proposed rule makes little hydrologic sense and frequently violates the sense of connectivity proposed in EPA's own scientific document. For example, the rule claims to exempt groundwater, but could use the groundwater connection to take jurisdiction over the surface water bodies on either end of the connection. It makes little hydrologic or jurisdictional sense that an upstream waterbody would be federally regulated because of a connection to a downstream waterbody when the hydrologic connection itself is not federally jurisdictional.

EPA has effectively given itself federal jurisdiction over waters that belong under state jurisdiction and is trying to achieve this by finessing the language of the Supreme Court in *Rapanos v. United States* and other rulings in which the Court's intent was clearly to restrict federal jurisdiction.[3] As reviewed in depth in the joint letter of the States' Attorneys General, the Supreme Court has clearly ruled that EPA has overreached its authority and must retract to limitations closely connected to waters navigable in the traditional sense. Furthermore, EPA has used the rulemaking process to effectively recapitulate the Oberstar bill, which attempted to nullify the *Rapanos* ruling and failed in

[1] Office of Research and Development, U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013) (Preliminary Draft).

[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, App. A (proposed April 21, 2014).

[3] North Dakota's legal concerns with the proposed rule are explained in more detail in the Comments of the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina submitted to the docket on October 8, 2014.

Congress.[4] In doing so, EPA has used rulemaking to subvert the intent of both the Supreme Court and Congress.

For example, EPA cites in their webinars spills in upstream tributaries to Tampa Bay and Texas to justify their incursions. These types of examples do not justify nullifying state jurisdiction over waters of the state. EPA's authority would be necessary and appropriate only at the point where upstream conditions had actually affected downstream WOTUS, which are navigable in the traditional sense at or in proximity to the confluence.

North Dakota's primary concern is that this rule intrudes on state authority over waters and allows the federal government to assert federal jurisdiction over virtually all waters. It is ill-defined, overly broad, and scientifically unjustified. If a pollution event occurs, it must be dealt with; however, this rule creates the potential for federal permitting, penalties, and responsibility surrounding every waterbody, far beyond the federal jurisdiction in *Rapanos*. North Dakota's state water quality program currently provides protections and oversees pollution events on all waters of the state including those beyond traditionally navigable waters, and that authority must remain intact.

2. The definition of tributary in the proposed rule is expansive and unacceptable to the State of North Dakota.

The proposed rule attempts to establish a chain of nexus extending up endless orders of streams into ephemeral flows in washes, drains, and ditches feeding the higher order navigable streams. This federal jurisdictional claim violates the intent of the court outlined in *Rapanos*. Instead of regulating the water quality effects of distant tributaries on the navigable streams, EPA proposes regulating water quality within tributaries themselves.

Take, for example, if federal water quality standards specify that a certain nutrient may not exceed a specific amount in a navigable stream. The proposed rule would subject influent tributaries to that same standard, rather than regulating the tributary's contribution to the standard in the navigable stream. Next, the lower order tributary influent to the first tributary is regulated not by the effect on the navigable water, or even the first tributary, but is subjected to the same standard as the navigable water. This overreaching jurisdiction is applied up into washes, ditches, and drains, which are themselves subjected to the standard applied to the navigable waterbody itself.

The cumulative effect of the above outlined water bodies on receiving navigable water bodies is moderated by timing, freshwater influx from stream beds and seeps, and other minimally affected tributaries. These factors make it so any given individual tributary or drain may have little final impact on the major receiving waterbody. To claim authority and apply the same standard within a flowing agricultural or municipal drain as is applied to an interstate water--without reference to intervening moderating effects--allows federal micromanagement and interference with virtually all human enterprises and a blank check to apply standards in any manner it chooses. EPA and

[4] The Oberstar Bill attempted to expand EPA jurisdiction by separately and expansively defining "waters of the United States" as follows: "The term waters of the United States means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." (Sec. 4. Definition of waters of the United States, in H.R. 2421, CWRA of 2007, at: http://www.govtrack.us/congress/bills/110/hr2421/text, accessed Oct. 2, 2014). By separately defining "waters of the United States," the Clean Water Act attempted to separate EPA jurisdiction from the navigable constraint to be inclusive of virtually all waters.

cooperating federal agencies are appropriating for themselves the authority to become the arbiter of all economic enterprises and the power to impede or vet them at will.

EPA must limit its federal jurisdictional claims to a nexus that is defined by proximity, not remote connectivity.

3. The proposed rule is unnecessary because states already protect all state waters.

The fact that some waters that are not included within the CWA's current definition of WOTUS does not mean they are left unprotected. These state-only waters have traditionally been under state control. States have historically exhibited the ability to appropriately regulate them and address statewide and local concerns.

In North Dakota, the Legislature established a policy to protect all waters of the state, regardless of whether they fall within federal jurisdiction. N.D.C.C. § 61-28-01. Waters of the state is defined broadly and includes all surface and groundwater in the state. N.D.C.C. § 61-28-02(15).

North Dakota law not only protects more types of waters than the CWA, it also places greater protections on those waters. For instance, it is unlawful in North Dakota to pollute or place wastes where they are likely to pollute any of these waters. N.D.C.C. § 61-28-06. And protections are included for waters involved in water transfers. N.D.C.C. § 61-28-09.

The NDDH goes above and beyond merely implementing the federal CWA programs delegated to it by EPA. NDDH also implements a comprehensive state program to protect all waters of the state, addressing the protection of beneficial uses as defined in state law. As part of this program, NDDH has adopted extensive regulations to prevent and control water pollution. See N.D. Admin. Code art. 33-16. A person violating the state's water pollution control laws and rules is subject to an NDDH enforcement action, including the potential of substantial penalties. N.D.C.C. § 61-28-08.

4. The category of other waters[5] is expansive and confusing.

The attempts to classify other waters gives EPA and the Corps the ability to superimpose federal jurisdiction over state jurisdiction virtually at will. Rather than providing clarity, this catch-all classification establishes a platform for unending federal versus state litigation. North Dakota does not support attempts to classify other waters as federally jurisdictional.

5. The redefinition of WOTUS will be used by all federal agencies, not just EPA and the Corps, multiplying the jurisdictional overreach and leading to unanticipated consequences.

Not only is North Dakota concerned with the scope of jurisdiction EPA and the Corps could have under this rule, but the expansive definition of WOTUS will have ramifications far beyond EPA's water quality mandates. The proposed rule broadly defines federal jurisdiction, and that will likely be used or relied on by all other federal agencies, including the United States Fish and Wildlife Service (USFWS), Bureau of Land Management (BLM), and others. The combined jurisdictional applications will exceed EPA's actions in exponential ways that are unanticipated in the proposed rule's impacts analysis.[6]

[5] 79 Fed. Reg. 22188, 22211-22212.

[6] 79 Fed. Reg. 22188, 22219-22222.

For example, North Dakota farmers are concerned that the USFWS could use the expanded definition of WOTUS to impose greater regulation on North Dakota farmland. During the last half of the 20th century, the USFWS obtained in-perpetuity waterfowl management rights easements for wetlands on thousands of acres of North Dakota farms. These easements were purchased for a pittance, a few dollars per acre, under a promise not to drain. The demonstrable understanding of farmers and the hydrologic paradigm of the time was of literal drainage, not water use through pumpage, and with the understanding that the wetlands were relatively stable in our semi-arid climate. The potential future impacts of the federal easements were not understood until the 1990s when larger degrees of climatic variation were experienced in North Dakota and the large rains came.

USFWS now uses these easements in ways not anticipated by farmers. After unprecedented flooding began in 1993, USFWS refused to allow farmers to restore their newly flooded land. USFWS had written the easements to include all surface waters on the quarter section, but had not defined or delineated the boundaries. On this basis, USFWS claimed all of the newly flooded lands – assuming control over large tracts of land for which USFWS had paid nothing. They used federal legal strength to intimidate and sue landowners attempting to restore boundaries, access, and productivity. These actions caused severe financial burden on the farmers and strained the relationship between the local farming community and the USFWS.

Additionally, the BLM could use the proposed rule to deny grazing permits and limit access to grazing lands. Grazing lands contain a multitude of ephemeral waterways. This proposed rule makes producer access to lands questionable at best. Under this rule, it is conceivable that if grazing lands are within a floodplain, have tributaries in them as defined in the proposed rule, or are adjacent to a WOTUS, the BLM could deny permits and unnecessarily restrict the use of natural resources for agriculture.

Many federal agencies use the CWA's definitions for their own purposes. It is unclear how this rule will impact the way agencies conduct their operations and use the rule to regulate their interests. North Dakota is concerned that other agencies could co-opt these definitions without providing notice and opportunity for comment. Even if the rule specified that the definition of WOTUS can only be used within jurisdiction of the CWA, other agencies could use CWA-related claims to advance their jurisdictions. For example, it may be claimed that lowering a water table through pumping will have a water quality effect, and the EPA would then become involved in local groundwater use issues raised by other agencies. Even if found insignificant, the regulatory burden of delays will add severe hardship to water-using enterprises and solutions to farm management problems.

The ambiguities created by this rule and the unknown exponential impacts through use by other federal agencies is further reason that the EPA definition of WOTUS must be discarded. Additionally, if any other federal agencies wish to establish a definition of waters under their jurisdiction, it should be done under separate rule making processes pertaining only to individual agencies.

6. The connectivity report is insufficient to establish significant nexus on a local and situational scale.

In proposing this rule, EPA and the Corps inappropriately rely on the connectivity report to establish a significant nexus on a local and situation scale. There are several problems with relying on the document this way, including:

- It lacks specific spatial points of reference to clearly move from state jurisdiction of waters of the state to a transitional point of water with federal jurisdiction;

- It does not outline a set of standards, chemical or biological, that determine at what level a connection becomes relevant;
- There are no clear means for evaluating the situational relevance of the document's findings in a real world setting.

The connectivity report is a general literature review of a fundamental truism of hydrology and environmental science – that everything is connected to everything else. But in reference to real-world application and significant nexus interpretation, it says nothing of the situational significance of any given waterbody or the circumstances under which the proposed jurisdictional shift from State to federal jurisdiction is appropriate. The document demonstrates connection, but does so abstractly. It does little to quantify significance with respect to any specific hydrologic system or point of reference. In effect, the connectivity report is little more than an expansive, unpacked version of the federal jurisdictional justification cited in the findings of the failed Oberstar's Clean Water Restoration Act (CWRA).[7]

Contrary to EPA's claims, the connectivity report does not provide an appropriately scaled assessment of sufficient scale and depth that could be applied *a' priori* to local situations (i.e., the water quality significance of specific tributaries to their receiving bodies). The connectivity report also fails to consider the temporal and spatial variance effecting connectivity, which is a major factor within the wide climatic swings of the northern Great Plains and the natural hydro-chemical effects in the region.

7. The Prairie Pothole Region (PPR) experiences wide climactic swings that lead to variability of water levels and more uncertainty under this rule.

a. Prairie potholes should not be considered *per se* federally jurisdictional.

Under the proposed rule, small, ephemeral, prairie pothole wetlands are considered *per se* federally jurisdictional. In the PPR, these wetlands are situated throughout agricultural land, as well as the rest of the landscape. They pose a federal jurisdictional problem because of their variable nature. The proposed rule is not clear on how depressional prairie pothole wetlands that fill and spill into jurisdictional waters would be regulated by the Corps and how the Corps will determine if prairie pothole wetlands have subsurface flow to federal jurisdictional waters. The preamble states, "[w]ater connected to such flows originate from adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface. Surface hydrologic connections via physical features or discrete features described above allow for confined, direct hydrologic flow between adjacent water and (a)(1) through (a)(5) water that it neighbors."[8] This verbiage captures many prairie pothole wetlands as federally jurisdictional. The preamble cites research conducted on prairie pothole wetlands in North Dakota to support the decision.

[7] The "Findings" of the Oberstar CWRA stated the following to justify the bill's definition of virtually all waters as waters of the United States (see Footnote 3 above for CWRA definition). "(4) Water is transported through interconnected hydrologic cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system… (6)The regulation of discharges of pollutants into interstate and intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States. (7)Small and intermittent streams, including ephemeral, and seasonal streams, and their start reaches comprise the majority of all stream and river miles in the conterminous United States. These waters reduce the introduction of pollutants to larger rivers and streams, affect the life cycles of aquatic organisms and wildlife, and impact the flow of higher order streams during floods." And other statements in Sec. Findings, of H.R. 2421, CWRA of 2007, at: http://www.govtrack.us/congress/bills/110/hr2421/text, accessed Oct. 2, 2014.

[8] Fed. Reg. 22188, 22208

The wide climatic swings and trends of the central plains, including an approximate 200-year cycle, causes conditions where many surface depressions are functionally dry uplands[9] or isolated wetlands for most of the period of record, but then connect and coalesce during extended wet periods. Many of these are remote from currently jurisdictional waters and connect only through a series of water bodies. The attenuated connections render the probability of water quality effects on the federally jurisdictional water negligible.

North Dakota does not accept federal jurisdiction over water bodies only remotely and indirectly connected to waters navigable in the traditional sense based on the concept of fill and spill. Only those wetlands that are abutting or adjacent to navigable waters as defined by *Rapanos* should be considered federally jurisdictional. Prairie pothole wetlands that fill and spill or have a subsurface hydrological connection are currently not considered jurisdictional by the North Dakota Corps Regulatory Office. The proposed rule will dramatically increase the wetland acreage and basins considered jurisdictional in the PPR of North Dakota and throughout the United States.

The hydrologic expansion and contraction, spillage, flooding, and disappearance of prairie potholes has a large influence on farming. Prairie potholes require special management, and making these wetlands per se federally jurisdictional will prevent farmers from managing these waters on their land. This will prevent weed control, pest control, and could impede input applications. Prairie potholes are abundant in this region, and during the extremely wet climate cycles that we are currently experiencing - this rule will only compound existing management problems.

b. The rule's inclusion of recreational use or potential future recreational use as jurisdictional will have unduly large effects in the PPR.

Virtually any pothole that could float a duck boat could be claimed as a potential future commercial waterborne recreation resource. Although EPA specifies that claims must be substantial, the mere filing of claims for federal jurisdiction would provide a tool for special interests to interfere with local water and land management. Further, there is inherent ambiguity in the term substantial.

8. The proposed rule's treatment of wetlands is inconsistent and overly broad, making virtually all wetlands jurisdictional.

Connectivity of wetlands under federal jurisdiction should be limited to those immediate or proximate to major flowing water bodies that are navigable in the traditional sense. Extended connections should be exempted.

a. When defined as tributaries with ephemeral flow, the widely varying climactic regimes in North Dakota will inevitably make almost all wetlands jurisdictional.

The proposed expansive definition of tributaries includes anything with a bed and banks and ordinary high water mark that ever sends any flow, and waters that contribute flow – either directly or through another water – even if the flow is ephemeral.[10] The chain of waters included under the tributary definition[11] is expanded even further by including adjacent

[9] Ex. Tappen Slough in Kidder County was hayland with dugouts for horse watering during the 1930s – it is several feet underwater today. Many converted lands, farmed as dryland for many years, have wetlands on them since the mid-1990s.

[10] 79 Fed. Reg. 22188, 22263.

[11] 79 Fed. Reg. 22188, 22198 ("All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary.").

waters and including other waters [12] by situation. This expansive definition means that almost all surface waters will be jurisdictional under various climactic scenarios. Under these proposed definitions, few wetlands would be exempt in a realistic field setting.

Depending on the year, climactic changes allow wetlands to overtop and connect with waters that would be tributaries or are completely dry. There are many large prairie potholes that in the 1930s were mostly dry and disconnected from any outlet. During the half century following the 1930s multi-decadal drought, many wetlands remained isolated. Following the wet shift in the 1990s, these wetlands have increasingly coalesced or connected with other wetlands and to larger water bodies. Which waters are connected varies depending on time and the current climate regime.

Under EPA's proposed rule, recent climatic events would authorize broad federal authority over depressional areas that are often isolated from the navigable water or even dry, but periodically connected. As above, it would be one thing to regulate a water quality component at the point of entry to a clearly navigable water during the time of physical connection. To use that temporary connection as a pretense to redefine that waterbody itself permanently as WOTUS represents a massive inflation of federal jurisdictional claims.

b. Wetlands on flood plains should not be in themselves regulated as WOTUS unless a clear, substantial, and ongoing effect on the flowing waterbody can be demonstrated. EPA refers to the appropriateness of its federal jurisdiction in relation to wetland effects on flooding.[13] In flat areas like the Red River Valley, virtually all wetland and depressional areas are connected with the Red River of the North or its tributaries during the frequent flood events of recent years. Virtually all wetlands in the Valley would be under EPA jurisdiction.

Depressional areas on vast expanses of land are connected with rivers during floods of varying magnitude in almost all of the Red River Valley. This is not to say their potential effect on major flowing water bodies should not be regulated – rather, they themselves should not be included as WOTUS, subject to the same federal jurisdiction as the major body itself. In effect, wetlands should not be considered *de facto* adjacent waters under the proposed rule.

9. EPA's adjacent waters definition is overly simplistic for the prairie pothole and central plains regions, creating federal jurisdiction where it is impractical to determine water boundaries and define connectivity.

a. EPA does not provide meaningful clarification on how adjacent waters will be determined.

The preamble fails to indicate how the agencies will determine if a shallow subsurface flow exists for adjacent waters. The examples provided on page 22208 of the preamble are speculative, stating "shallow subsurface connections may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches) where other wetland delineation factors may not be present" (emphasis added).[14] The preamble continues: "a combination of physical factors may reflect the presence of a shallow subsurface connection, including (but not limited to) stream hydrography (for example, when the hydrograph

[12] Id. ("d.1. 79, No. 76/Monday, April 21, 2014/Proposed Rules, impoundment, impoundmenttate water, the territorial seas, impoundmentcluding wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas").

[13] 79 Fed. Reg. 22188, 22191, and 22193.

[14] 79 Fed. Reg. 22188, 22208.

indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower the in the shallow subsurface"[15] (emphasis added). No field indicators are required to make this determination.

The Natural Resource Conservation Service (NRCS) soil survey web site states that soil surveys can be used for general farm, local, and wider area planning. NRCS soil surveys are considered an Order 3 soil survey and are made for land uses that do not require precise knowledge of small areas or detailed soils information. Such survey areas are usually dominated by a single land use and have few subordinate uses. The information can be used in planning for range, forest, recreational areas, and in community planning. But this is not a tool that will be accurate to determine a subsurface flow connection from wetlands to federal jurisdictional waters.

b. Using floodplains to create *per se* federal jurisdiction is ill-defined and will result in expansive federal jurisdictional claims.

Floodplains vary across the country based on climate and geography. In parts of the west, floodplains may be limited to the bed and bank of the flooding body where this regulation could possibly make more sense. However, in the Red River Valley of North Dakota and Minnesota, the flatness of the land allows the floodplain to be miles wide. Using a vague definition of floodplain would allow the EPA and Corps to have federal jurisdiction over miles of land after the flood recedes; not to mention the potholes, wetlands, and streams filled by the flood.

Defining floodplains by a set number of years event is also ineffective because floodplains can change dramatically with climactic and meteorological changes. Rather, water in floodplains should only be jurisdictional within the riparian area of the flooded zone. This pragmatic approach acknowledges that flood spillovers can cause pollution problems, but also realizes that large realms of federal jurisdiction are not the solution.

c. The rule's supposed ditch exemptions are unrealistic and negate the purpose of ditches.

Section 328.3(b)(3) states, "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" would not be WOTUS. However section 328.3(b)(4) states, "[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a) (1) through (4) of this section" would also not be WOTUS. As written, paragraph three of the proposed rule excludes qualifying ditches yet, if those same ditches contribute flow, they would be not be exempt under paragraph four. These conflicting examples demonstrate the uncertainty of the proposed rule's ditch exemptions.

In an effort to provide clarification, the rule explains that ditches are not jurisdictional if they are "excavated in uplands, rather than in wetlands or other types of waters, [and] for their entire length are not tributaries."[16] In North Dakota, there are very few ditches that would not intersect water at some point in their path due to our wide stretches of agricultural land and flat topography. This exclusion could be interpreted very literally, such that any downstream connection – no matter how miniscule or indirect – would prevent the exclusion from being applied. Ditches are designed to drain – this requirement makes the above exemptions useless, especially in an agriculture or transportation scenario.

[15] 79 Fed. Reg. 22208

[16] 79 Fed. Reg. 22188, 22203.

In an agriculture scenario, if ditches cross between or within farm fields, pastures, or grazing lands, farmers could be forced into a situation where they need to get a CWA permit for insect and weed control or certain farm activities (left ambiguous by the poorly written Interpretive Rule)[17] if there is a discharge in or near an ephemeral drain, ditch, or low spot.

In a transportation setting, all highway ditches that take stormwater runoff somewhere would potentially meet the definition of WOTUS under the proposed rule. If applied or interpreted in this manner, the permitting requirements for highway construction and maintenance activities would be unduly burdensome.

In addition, few ditches draining only uplands for any purpose are confined only to uplands. To do so floods other lands. Almost all drains go somewhere and release water to navigable streams at some point. Since they do, they would be included in the definition of a tributary, and therefore jurisdictional in the same sense as the navigable water itself. As with wetlands discussed above, the presence of perennial flow is dependent on climate regime and fluctuations in normal rainfall. There are many drains with perennial flow now that were not perennial 25 years ago.

The effect of a drain on a navigable water is an area of possible legitimate federal jurisdiction. But the water within the drain above that confluence should not be. The drain should only be jurisdictional at the point of confluence with a navigable water and within a clearly defined set of standards. The drain itself should remain within state jurisdiction and should not be treated as a tributary.

10. The shallow groundwater connection criteria is not appropriate.

If EPA and the Corps retain the shallow groundwater connection criterion, it will inevitably result in federal interference in state water appropriations and agricultural land management.

a. The inclusion of wetlands connected through shallow groundwater in the proposed rule is highly invasive of state water-management authority and needs to be removed.

The relationship between ponded waters overlying shallow unconfined aquifers and surface waters is strongly mediated by the management of the intervening waters. This management can include disconnection – or partial/total depletion by pumping. All pumped ground water in these aquifers must be recovered from discharge to rivers or evapotranspiration. Pumping in some cases may remove poor quality waters, as when waters from evaporative discharge areas are drawn toward wells. Discharge areas may be converted to recharge areas by pumping. Moreover, the effects of management will vary with fluctuations in the climatic regime, which may enhance, moderate, or negate management impacts. These shallow aquifers are major sources of water for irrigation, towns, and industries in the northern Great Plains – in fact, one of the largest sources.

Given past attempts by federal agencies in attempting to control water-table surfaces, it is highly probable that federal agencies will attempt to interfere with state groundwater appropriation using the proposed rule as justification. They will simply assert that the state has the right to appropriate groundwater for pumping and beneficial use, but local water table exposures are all WOTUS by virtue of groundwater connection with gaining streams they

[17] North Dakota's concerns with the Interpretive Rule and its effect on agriculture are explained in more detail in the comments from the North Dakota Department of Agriculture submitted to the Interpretive Rule docket on July 7, 2014.

claim to be jurisdictional, and their water-levels cannot be altered by pumping – a hydrologic impossibility. Definition of these waters as WOTUS will inevitably result in federal incursion on state groundwater appropriation jurisdiction, either through direct intervention of agencies using the WOTUS claim or indirect intervention through appeal for EPA involvement.[18]

In short, federal involvement through indirect claimed jurisdiction can be expected in almost all state water appropriations from shallow systems in North Dakota. This would render the aquifers virtually unavailable for beneficial use. Shallow unconfined glacial aquifers are a major source of water for irrigation, homes, industries, and municipalities in North Dakota and other states. State groundwater appropriation jurisdiction will mean nothing if permit holders are threatened by federal intervention if they pump. This is not to say that wetlands of major importance overlying aquifers should never be protected – the State does consider and implement protective measures for major resources like the Chase Lake refuge – only that these decisions belong to the State.

b. Using shallow groundwater connections to claim a nexus would allow EPA to inappropriately intervene in agricultural management.

Due to the rapidly changing climate and frequent spring flooding in agriculture areas, North Dakota farmers need to frequently pursue temporary ditching and manipulation of the land to enhance water movement and allow for planting. Most of these areas contain shallow, unconfined aquifers that are connected with streams or drainageways to streams. This means that virtually any ponded area overlying shallow unconfined aquifers, which are major areas of agriculture, could be considered jurisdictional when EPA or other agencies decide so. A dangerous opportunity for EPA intervention, to the harm of the farmers, is created in the proposed rule.

A generic definition of all waterbodies connected through ground water as WOTUS is a large and unjustified federal jurisdictional encroachment.

c. The connected surface water through shallow groundwater inclusion must be removed from this rule, disallowing EPA and the Corps from using these connections to determine federal jurisdiction.

EPA and other agencies cannot interfere with state authority to not only appropriate ground water, but assure the use of the water appropriated. The shallow groundwater nexus can only apply to the confluence of a surface waterbody with a navigable stream. In addition, these waters are protected through state jurisdiction.

11. The proposed rule would result in unprecedented federal intervention in agricultural management and practice.

a. The expanded tributary definition does not provide clarity and could act as a roadblock to normal agricultural practices.

The definitions of tributaries and their riparian lands are so expansive, that vast areas of agricultural land will be contained within areas defined as jurisdictional. The statement that EPA is not managing land is nonsensical. The most fundamental management practice of agriculture is water management – its retention, conservation, or removal. This rule claims

[18] The U.S. Fish and Wildlife Service during the 1990s challenged virtually every water permit application for ground-water pumping in Kidder County, ND and other areas based on what they considered to be unallowable impacts on their wetland easements. They were essentially claiming the right to control the water table, hence the aquifer itself.

jurisdiction over anything from fields to tributary drains at field outlets, and leverages authority over agricultural practices smaller than field scale. Conditions and climatic events that impact farmers are highly variable and even erratic, making state jurisdiction appropriate over federal.

For example, North Dakota has experienced a wet cycle during the last two decades in which water lying in fields drastically changes throughout the year. In the eastern part of the state, where the landscape is flat, water may sit in a field from April through June, and then dry up for the end of the planting season. Under the proposed rule, this depressed area – if it develops a bed, bank, and ordinary high water mark or reaches an actual navigable water – could be considered a WOTUS. This could be anything from a tire track that sits with water too long to a low area where rainwater channels.

Additionally, the federal jurisdictional inclusion of intermittent streams and tributaries and ephemeral streams means agriculture management will be further impeded, as farmers will not know which water on their lands is jurisdictional. The broad scope of these regulations creates a scenario where the farmer is going to have to prove that they did not discharge rather than federal agencies proving that there is a problem. This is a backwards scenario. If there is a discharge into upstream waters, it is regulated by the state and is appropriately handled at the state level. It is the state's responsibility to address pollution events until they impact waters within EPA's jurisdiction as defined by the Supreme Court. Current state oversight makes it unnecessary and unjustified for EPA to regulate all waters as a just-in-case senario.

b. Agriculture drains should not be regulated as WOTUS; rather, states jurisdiction should address pollution concerns.

The agriculture drainage exemption conflicts with the inclusion of ditches as tributaries. Similarly, exemptions of drains wholly in uplands or that do not discharge into EPA's expansively defined tributaries are trivial. Agricultural waters flow into drains that invariably go somewhere. For example, the exemption of subsurface drains as claimed by EPA is trivial because subsurface drains generally flow directly into surface drains that are claimed jurisdictional in the proposed rule. Very seldom do drains, including tile drains, flow into a waterbody that would not be considered tributary under the proposed expansive definitions. If use of the drains themselves is impaired by regulatory overreach by EPA or others with respect to drains, exemption of water removal at the land location will have little meaning.

Agricultural drains should not be regulated as WOTUS. While the cumulative effect of drains on navigable interstate waters at discharge points should be subjected to state-based requirements, the oversight should not be on the drain. Instead, states should be allowed to focus on the receiving waterbody if there is a pollution problem.

c. The storm water runoff exemption is ill-defined.

EPA needs to clarify if the stormwater runoff exemption refers to tile and surface drainage practices that remove those waters. If not, the exemption provides little protection to agriculture producers. It is important to understand that EPA's definition of tributary would not only authorize it to regulate water quality or limit discharge of agricultural chemicals (as with a TMDL) into a major natural waterway affecting downstream interests, but within the drain itself – within which waters would be under direct EPA jurisdiction. This offers an opportunity for micromanagement of the land itself at the field exit point, discounting downstream dissipation factors within the ditch or intervening wetlands.

North Dakota is particularly concerned with the impact to farmers during the current wet cycle. Within the wet climate scenario, many depressional areas flood. North Dakota is currently dealing with situations that involve the expansion of waters into farmsteads, farm fields, and towns. Many of these would be connected naturally under some scenarios; others would need to be artificially connected (drained) to protect the flooded parties. This authority would offer a powerful tool for federal interests to interfere with farmland water management, causing farmers hardship and delay as they are forced to spend more money and time on the permitting process.

12. Most fundamentally, EPA's definition of nexus makes no sense with respect to actual federal jurisdiction over remote waterbodies.

The significant nexus criterion makes sense in recognizing a federal jurisdiction over the quality of tributary water or neighboring waters at the confluence with navigable waters related to interstate commerce, and which affect the quality of those waters. EPA's proposed definitions do not provide jurisdictional clarity, they only expand jurisdiction.

However, it is difficult to argue that CWA jurisdiction does not allow federal regulatory limitations (with reference to specific standards) on entry of pollutants into clearly delineated federal (navigable) waters at the confluence of the tributary with those waters. It is quite another matter, however, to claim federal jurisdiction over the influent tributary upstream of the confluence, and apply the same standards to that waterbody as to the navigable stream – and then subsequently expand the federal jurisdiction and the same standards to tributaries feeding the influent tributary in a chain of dependent jurisdictions all the way up to and including agricultural ditches. It is the cumulative effect of upstream management, which affects navigable streams related to interstate commerce and which affects federal interests, not the individual upstream tributaries themselves. Upstream tributaries, which are not directly influent to navigable waters, belong under State jurisdiction to allow for flexibility in managing upstream water-use impact problems and their effects on State and local priorities.

13. North Dakota requests that the WOTUS rule be withdrawn. At a minimum, the states must be consulted, the rule must be amended, and then the rule must be put out for a second round of comments.

North Dakota believes the EPA and the Corps must withdraw the proposed rule. This rule was proposed before the final connectivity report was published, failing to give EPA and interested parties the chance to understand any science that may support the definitions.

If the EPA and Corps insist on proposing new definitions, a new draft and a second round of comments is needed following outreach with the state co-regulators and affected agencies. While EPA did conduct hearings, webinars, and meetings on this rule, states should have been consulted prior to the rule's release to avoid instances of federal overreach and to gain an understanding of what water features are like in different regions. Further compounding this problem is that the Corps, an issuing agency of the rule, did no outreach on this rulemaking process. The Corps has authority over determining what is federally jurisdictional. If this is the agency that is going to be issuing guidance and be on the ground during implementation, they need to hear from affected individuals, groups, and industries to fully understand the extent of the harm the rule as proposed could cause and how it can be made better in the future.

A new draft appropriately considering the constraints of proximity to waterbodies specified in the plurality decision of *Rapanos* is needed.

EPA has admitted in regional and national conference calls and webinars that many mistakes were made in this rulemaking process. Reopening a draft for comments will help states, their constituents, and industries know that EPA is listening to concerns and willing to work in a manner that will get this rule right.

Furthermore, throughout the public comment period, the federal agencies have continually released new documents, blog posts, Q&A documents, and webinars, offering explanations of key terms and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this new information is inconsistent with material provided in the official rulemaking docket. These additions inhibit public comment as the agencies keep changing their story and adding new (and often conflicting) information as the comment period progressed.

For example, the term upland is not defined in the proposed rule, but is necessary when determining whether a ditch is exempt. Throughout the comment period, the agencies acknowledged that they do not have a proposed definition of upland. Now, a recent Q&A document, issued by the agencies on September 9, 2014, provides a new definition of upland: "Under the rule, 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction." This new definition of upland is not included anywhere in the rulemaking docket. The public cannot adequately comment on a proposed rule if critical components continually change and are not posted in the Federal Register.

THE STATE'S POSITION

The proposed rule does not simplify CWA applications for the regulated population. Rather it increases confusion by proposing a one-size-fits-all framework that glosses over the real complexities of local hydrologic systems and enables federal micromanagement where it is inappropriate and problematic. The proposed rule also raises broader issues concerning the boundaries of jurisdiction between elected governments of states and the legitimate limits within which federal bureaus and agencies can define their own jurisdictions over state resources, and thereby the economies of states. The proposed rule needs to be withdrawn and reconsidered. A major rewrite and structural modification of the proposed rule is needed to resolve the critical issues described above.

To summarize the State's position, the Constitution of the State of North Dakota, Article XI, states that:
"All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation and manufacturing purposes."

It is North Dakota's position that waters within its boundaries belong to the State and are allocated and protected under state jurisdiction. Within these waters, those related to interstate commerce under the commerce clause of the U.S. Constitution may be subject to additional federal protection under the CWA. As discussed briefly in the introduction to this letter and as reviewed in depth in the joint letter of the States' Attorneys General, the Supreme Court has clearly ruled that EPA has overreached its authority and must retract to limitations closely connected to waters navigable in the traditional sense. Waters beyond these are under state jurisdiction, a real jurisdiction not subsidiary to federal control. It is the State's position that EPA and the Corps have ignored Court mandates and attempted to use the rule making process to make a massive, dangerous, and illegal claim of federal jurisdiction over the waters of the state – a claim that extends far beyond any reasonable extension of nexus related to jurisdictional allowances of the Court.

The State of North Dakota, through its laws and agencies, is responsible for and protects the waters of the state, both surface water and groundwater, under provisions that prevent degradation below the level

related to the highest potential use. Pollution prevention and correction are conducted under state water quality regulations administered by the NDDH and by agricultural chemical restrictions administered by the Department of Agriculture. In addition, water quality impacts of stream depletions are considered in both NDDH discharge standards and water appropriation evaluations administered by the State Engineer. The water quality impacts on major wetland resources and wildlife refuges are also considered and weighed in the water appropriation process, but not so completely weighted as to lock up the use of aquifers, which comprise one of the most vital sources of water for the State's citizens. It is the State, through its close proximity and intimate knowledge of both State resources and the needs of its people, that is best positioned to weigh, balance, and implement water quality protection measures in a sensible and effective manner, without unnecessary and undo harm to the State's citizens.

It is the State's position that EPA and the Corps must retract their proposed rules. If the EPA and Corps continue to propose new definitions, this must be done in consultation with the states, be respectful of state jurisdictions, and be in conformance with Court rulings.

In conclusion, both state and federal agencies understand the importance of environmental water quality and protecting our vital water resources against pollution that will render it unsafe or unusable for wildlife, recreation, and human consumption and use. State interests also understand the collective responsibility for stewardship of waters that affect downstream users and resources and the importance of local contributions toward efforts in their protection. However, the Constitution of the United States, the State Constitution, and two centuries of legal precedent have long established that states have jurisdiction over their waters and are not just a subsidiary executive functioning for federal agencies and bureaus.

We look forward to working cooperatively with EPA in delineating the appropriate boundary of federal and state jurisdiction and developing programs to adequately protect both WOTUS and waters of the state, both within and across jurisdictions.

Sincerely,

Jack Dalrymple
Governor

Wayne Stenehjem
Attorney General

Doug Goehring
Agriculture Commissioner

Todd Sando, P.E.
State Engineer

Grant Levi, P.E.
NDDOT Director

Terry L. Dwelle, MD, MPHTM, FAAP, CPH
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Karlene Fine
North Dakota Industrial Commission

Office of Attorney General
State of West Virginia

Patrick Morrisey
Attorney General

Office of Attorney General
State of Wisconsin

Brad D. Schimel
Attorney General

June 19, 2017

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Submitted via electronic mail

Re: Comments of the States of West Virginia, Wisconsin, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Utah, and the Commonwealth of Kentucky on the U.S. Environmental Protection Agency's request for comment on the definition of "waters of the United States."

Dear Administrator Pruitt:

As representatives of our States, we urge the Environmental Protection Agency ("EPA") to adopt a definition of "waters of the United States" under the Clean Water Act of 1972 ("CWA") that preserves the important role of the States in protecting the nation's water resources.

In 2015, the EPA and the U.S. Army Corps of Engineers (the "Corps") (collectively the "Agencies") adopted the WOTUS Rule, *see* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015), which came under immediate challenge. Thirty States, including the signatories of this letter, and other parties sought judicial review, resulting in orders from two federal courts staying implementation of the WOTUS Rule. The WOTUS Rule is unlawful because it conflicts with both the CWA's text and the U.S. Supreme Court precedent concerning the CWA and because it significantly impinges upon the States' traditional role as the primary regulators of land and water resources within their borders.

Now the Agencies have an opportunity to pursue a lawful rule that adheres to the text of the CWA and U.S. Supreme Court precedent. We are encouraged by EPA's outreach to state and local governments at this early stage in the process of replacing the Rule, and we urge EPA to continue to engage with States throughout the rulemaking process. We write to suggest how the Agencies can write a rule that respects Congress's instruction in the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). In particular, we urge EPA and the Corps to adopt an approach consistent with Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), as urged by the President's recent executive order. Indeed, many of the undersigned States believe that Justice Scalia's plurality opinion identifies the outermost bound of permissible federal jurisdiction authorized by the statute, and many of the undersigned States would consider bringing another legal challenge against any regulatory definition of "waters of the United States" that exceeds the scope defined by Justice Scalia's plurality opinion. In the alternative, if EPA and the Corps wish to adopt an approach tailored to Justice Kennedy's *Rapanos* concurrence—which the States do not believe is necessary, and many States believe would be unlawful and plainly in excess of EPA's statutory jurisdiction—the States urge that any such approach should be carefully tailored to addressing the concerns that Justice Kennedy raised regarding federalism and the traditional authority of the States as principal regulators of waters within their borders.

I. Background

A. The Clean Water Act

The CWA provides that the Agencies have regulatory authority over "navigable waters," defined as "waters of the United States," 33 U.S.C. §§ 1344, 1362(7), which triggers numerous regulatory requirements. Any person who causes pollutant discharges into "waters of the United States" must obtain a permit under the section 402 National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, or under section 404 of the CWA for dredged or fill material, *id.* § 1344, subject to certain exclusions. "'The discharge of a pollutant' is defined broadly to include 'any addition of any pollutant to navigable waters from any point source,' and 'pollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt.'" *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (citing 33 U.S.C. §§ 1362(12), 1362(6)). Obtaining a permit is an expensive process that can take years and cost tens of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344. Discharging into "waters of the United States" without a permit can subject a farmer or private homeowner to criminal and civil penalties, including fines of up to $51,570 per violation, per day. 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

Federal jurisdiction under the CWA also imposes costs specially on the States. Some of those costs relate to permitting under the CWA. In forty-six States, it is the States and not the federal government that have primary NPDES permitting responsibilities under 33 U.S.C. § 1342(b). NPDES Program Authorizations, https://www.epa.gov/npdes/npdes-program-authorizations (last visited May 24, 2017). In addition, all States must create water quality

standards for those "waters of the [United] State[s]" within their borders, 33 U.S.C. § 1313, and States must issue water quality certifications for every federal permit that is issued by EPA or the Corps within their borders. *Id.* § 1341. Every two years, States also must report to EPA on the condition of those waters, *id.* § 1315, and if waters do not meet their designated standards, the States must develop detailed pollution diets for those waters and submit those diets to EPA for approval, *id.* § 1313(d).

Importantly, the States have robust programs to protect their own waters, regardless of whether those waters are regulated under the CWA. *See, e.g.*, N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.*

B. Supreme Court Decisions Rejecting The Agencies' Overbroad Interpretations Of "Waters Of The United States"

Twice in the last sixteen years, the Supreme Court has rejected attempts by EPA and the Corps to extend their jurisdiction beyond the CWA. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court rejected the Corps' assertion of jurisdiction over waters "[w]hich are or would be used as habitat" by migratory birds. *Id.* at 164. The Court concluded that the CWA does not reach "nonnavigable, isolated, intrastate waters," such as seasonal ponds. *Id.* at 171. The Court explained that "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use," *id.* at 174, and it required "a clear indication that Congress intended that result," *id.* at 172. But the Court found no clear statement authorizing the Corps' expansive view; to the contrary, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" 33 U.S.C. § 1251(b).

Next, in *Rapanos*, the Supreme Court rejected the Corps' assertion of authority over intrastate wetlands that are not significantly connected to navigable-in-fact waters. The Court's majority consisted of a four-Justice plurality opinion written by Justice Scalia and Justice Kennedy's opinion concurring in the judgment.

Pointing to several sources for statutory construction, the plurality concluded that, "on its only plausible interpretation," CWA jurisdiction extends "only [to] those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "wetlands with a continuous surface connection to" those waters, *id.* at 742. Specifically, the plurality based this conclusion on "[t]he only natural definition of the term 'waters,' [the Court's] prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and th[e] Court's canons of construction." *Id.* at 731.

In his separate opinion, Justice Kennedy also rejected the Corps' broad assertion of authority but on a different ground, stating that the Agencies only have authority over waters that are navigable-in-fact and waters with a "significant nexus" to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (citing *United States v. Appalachian Power Co.*, 311 U.S. 377, 407–08 (1940)). On Justice Kennedy's analysis, a water has a "significant nexus" if it "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water. *Id.* at 779–80. Accordingly, Justice Kennedy rejected jurisdiction over all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776; *see also id.* at 769 ("merest trickle, [even] if continuous" is insufficient." *Id.* at 780. Justice Kennedy explained that the Corps' approach "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778.

In the years since *Rapanos*, the courts of appeals have disagreed over the controlling effect of the two opinions composing the majority. Under *Marks v. United States*, 430 U.S. 188 (1977), "[w]hen a fragmented Court decides a case[,] . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193 (citation omitted). In conducting the *Marks* analysis of *Rapanos*, the courts of appeals have reached different results. *Compare United States v. Donovan*, 661 F.3d 174, 176 (3d Cir. 2011) (holding the Agencies may assert jurisdiction over waters that satisfy either test), *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (same), and *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (same), *with United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (holding Justice Kennedy's test governs), *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (same), and *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (same).

C. Two Federal Courts Block The WOTUS Rule As Unlawful And Harmful To The States

In June 2015, EPA and the U.S. Army Corps of Engineers ("Corps") (collectively "the Agencies") issued the final Clean Water Rule: Definition of "Waters of the United States" ("WOTUS Rule"), 80 Fed. Reg. 37,053 (June 29, 2015). The WOTUS Rule asserted sweeping jurisdiction over usually dry channels occasionally carrying "[t]he merest trickle[s]" into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The WOTUS Rule also covered waters merely because they are somewhat near such a dry channel and land features that connect to navigable waters only, if ever, after a once-in-a-century rainstorm.

Our States, among others, filed suit in various federal courts because the WOTUS Rule violates the CWA, the Administrative Procedure Act, and the U.S. Constitution.[1] The WOTUS

[1] *See Murray Energy Corp. v. EPA*, No. 15-3887 (and consolidated cases) (6th Cir.); *North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D. filed June 29, 2015); *Ohio v. U.S. Army Corps of*

Rule violates the CWA under either the *Rapanos* plurality or Justice Kennedy's concurrence. And even if the WOTUS Rule were not prohibited by the Supreme Court's clear directives, it is unlawful because it is not clearly permitted by the language of the CWA. As the Supreme Court held in *SWANCC*, federal regulation of vast numbers of local land and water features within the core state function requires a clear statement from Congress. Moreover, the Agencies adopted the WOTUS Rule in violation of the Administrative Procedure Act by adopting five distance-based components and one unduly narrow exclusion never even arguably presented in the Agencies' proposed rule and lacking record support. Finally, the WOTUS Rule violates the Constitution by intruding on the States' reserved authority under the Tenth Amendment and exceeding Congress's authority under the Commerce Clause.

Reflecting the strength of these challenges, the WOTUS Rule has been stayed by two federal courts. The day before the WOTUS Rule's effective date, the U.S. District Court for the District of North Dakota stayed implementation of the Rule in thirteen plaintiff-States pending judicial review of the Rule. *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D. N.D. 2015). Then on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed implementation of the WOTUS Rule nationwide, finding that the Rule was likely unlawful. *In re EPA*, 803 F.3d 804 (6th Cir. 2015).[2]

D. The Executive Order Instructing the Agencies to Rescind or Revise the Rule and EPA's Plan to Implement the Executive Order.

In February 2017, the President issued an Executive Order instructing EPA and the Corps to review the WOTUS Rule and issue for notice and comment a proposed rule revising or rescinding the rule as appropriate. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Order further instructs the Agencies to consider interpreting the term "navigable waters" as defined in 33 U.S.C. § 1362(7) in the Clean Water Act consistent with the plurality opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Agencies have adopted a two-step approach for implementing the Executive Order. First, the Agencies intend to propose withdrawing the WOTUS Rule and re-promulgating the 1986 rule. Second, the Agencies will propose a new definition of "waters of the United States"

Eng'rs, No. 2:15-cv-2467 (S.D. Ohio filed June 29, 2015); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. filed June 29, 2015); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga. filed June 30, 2015); *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Okla. filed July 8, 2015).

[2] The Sixth Circuit also decided that it had jurisdiction to consider challenges to the WOTUS Rule in the first instance under 33 U.S.C. § 1369(b)(1*). In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of the U.S.*, 817 F.3d 261 (6th Cir. 2016). In September, 2016 the National Association of Manufacturers filed a petition for a writ of certiorari with the United States Supreme Court appealing that decision. The U.S. Supreme Court granted the petition. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 137 S. Ct. 811 (Jan. 13, 2017). The case has not yet been scheduled for oral argument.

consistent with Justice Scalia's *Rapanos* opinion. EPA has sought comment from state and local government on the federalism aspects of a new definition.

II. Discussion

As officials from States, we write to explain how the Agencies should define "waters of the United States" consistent with the role that States currently play in the management of land and water use.

As a threshold matter, we think there are good arguments that federal jurisdiction under the CWA extends only to navigable waters. The text of the CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). And "[f]or a century prior to the CWA, [the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality opinion) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). That reading also links federal jurisdiction under the CWA with Congress's constitutional authority to regulate commerce "among the several States," U.S. Const. art. I, § 8, cl. 3, which is conducted through navigable waterways.

However, in light of the Supreme Court's decision in *Rapanos*, it may be appropriate for the Agencies to look to the views of the Justices who made up the controlling majority in that case. As between the views expressed by those Justices, we urge the Agencies to adopt a rule defining "waters of the United States" in the manner identified in Justice Scalia's plurality opinion because that approach is more consistent with the text and purpose of the CWA. Indeed, as noted above, many of the undersigned States believe that the Agencies' jurisdiction to regulate "waters" extends no farther than Justice Scalia's plurality opinion in *Rapanos*, and those States likely would challenge any regulatory definition drawn from Justice Kennedy's concurrence in *Rapanos*. Alternatively, should the Agencies decide to take the approach of Justice Kennedy's concurrence, over the undersigned States' objections, we respectfully urge the Agencies to take into account the extent to which the States already protect land and water resources within their borders.

A. The Agencies Should Adopt the Scalia Plurality Test as Their Approach to CWA Jurisdiction.

The Agencies should base their approach on the *Rapanos* plurality because it better comports with the text of the CWA. Such a rule would provide for federal jurisdiction over "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) and "wetlands with a continuous surface connection to" those waters, *id.* at 742 (Scalia, J., plurality). As the plurality explained, this conclusion follows from several sources of statutory construction.

For example, the plurality focused on Congress's use of the term "the waters"—in particular, "[t]he use of the definite article ('the') and the plural number ('waters')." *Id.* at 732. This term refers "plainly" not to "water in general" but "more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes." *Id.* at 732 (quoting Webster's New International Dictionary 2882 (2d ed. 1954)). These are all "continuously present, fixed bodies of water," and not "ordinarily dry channels through which water occasionally or intermittently flows," such as "transitory puddles or ephemeral flows of water." *Id.* at 733.

In addition, the plurality determined that the CWA's use of the term "navigable waters" further confirmed that jurisdiction is limited to "relatively *permanent* bodies of water." *Id.* at 734 (emphasis in original). That is because the CWA "adopted that traditional term from its predecessor statutes," and the "traditional understanding" of the term "navigable waters" included only "discrete *bodies* of water." *Id.*

The plurality also found "[m]ost significant of all" that the CWA itself categorizes channels that carry intermittent flows of water, such as pipes, ditches, channels, tunnels, conduits, and wells, as "point sources" and not "navigable waters" *Id.* at 735. The plurality highlighted the CWA's definition of "discharge of a pollutant," which uses the terms "point sources and "navigable waters" as distinct categories. Under the statute, a "discharge of a pollutant" consists of "any addition of any pollutant *to* navigable waters *from* any point source." As the plurality explained, this definition "would make little sense if the two categories"—point source and navigable waters—"were significantly overlapping." *Id.*

Finally, the plurality explained that even if there were ambiguity as to the meaning of "waters of the United States," the *SWANCC* clear statement rule would prohibit the Corps' interpretation. *Id.* at 737–38. The extensive federal jurisdiction would allow the federal government to exercise the "quintessential state and local power" of regulating "immense stretches of intrastate land." *See id.* at 738. The plurality explained that as in *SWANCC*, it would expect a clear statement from Congress authorizing such an "intrusion into traditional state authority." *Id.*

The test that Justice Scalia's plurality opinion proposed also forwards the CWA's purpose of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). This approach would preserve the role of the States as the primary regulators of land and water resources by allowing for federal jurisdiction over only relatively permanent bodies of water. The definition leaves within state control local non-navigable intrastate topographical features that most benefit from the "local policies 'more sensitive to the diverse needs of a heterogeneous society,'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Those features vary greatly across the country from dry arroyos in New Mexico to ephemeral drainages in Wyoming to swales in Ohio farmland to prairie potholes in North Dakota to thousands of square miles of Alaskan land that is frozen most of the year. The States take very seriously the task of

preserving the land and water resources within their borders consistent with local needs and act accordingly to protect those resources.

B. If the Agencies Reach Waters Beyond the Plurality Test, They Should Carefully Consider the Extent to Which the States Already Protect Those Waters.

Though we believe the Agencies should adopt the plurality approach, we recognize that the Agencies may conclude that they want to rely upon Justice Kennedy's concurrence. To be clear, we do not believe that the Agencies should do so, and many of the undersigned States likely would challenge such approach in Court. But should the Agencies nevertheless decide to follow such an approach, over the objections of the undersigned States, we urge them to carefully consider, at the very least, the extent to which States already fully protect these waters under state law and to build any approach around that understanding.

In particular, to the extent the Agencies extend jurisdiction under Justice Kennedy's approach, in order to remain true to that approach, they should do so only where the Agencies have determined that the State's permitting program has failed with respect to a particular body of water, such that *the water* would—unless subject to federal regulation—have a significant, detrimental effect on the "chemical, physical, and biological integrity" of navigable waters. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). The reason for this approach is that regulation of non-navigable waters is *only* justified under Justice Kennedy's approach in order to *protect* navigable waters that are the subject of interest under the CWA. *Id.* If a state is *already* adequately protecting those non-navigable waters, such that there is no significant impact on the "chemical, physical, and biological integrity" of navigable waters, no possible rationale for imposing federal regulatory control over that water exists.

In order to implement Justice Kennedy's approach rigorously and consistent with the CWA's respect for state primacy over local water and land use planning, a three-step inquiry would be required to remain true to Justice Kennedy's approach. *First*, the Agencies should be required to make an initial determination that the State's permitting program has failed to regulate a water to such a degree that it would, unless subject to regulation under the CWA, "significantly affect the chemical, physical, and biological integrity of" navigable waters. That finding would consist of defining a water that the State has failed to protect. Then the Agencies would need to show that the State's failure to regulate that water significantly would affect the chemical, physical, and biological integrity of navigable waters, unless that water were made subject to CWA oversight. *Second*, the Agencies should be required to provide the State with the opportunity to challenge the determination through an administrative process. Specifically, the State should have the right to file an administrative appeal and participate in a hearing on the matter. *Third*, the State should have the opportunity to file and complete an appeal of the decision by the Agency to a federal court before the designation would take effect.

Such an approach would at least begin to recognize important federalism principles. Again, the CWA was designed to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33

U.S.C. § 1251(b). This approach would allow the States some flexibility to design state law in order to protect the water resources within their borders. It also would provide any State for which EPA attempts to designate certain waters an opportunity to explain to EPA why its regulatory program is sufficient to protect those waters and contest EPA's determination that those waters significantly affect navigable waters. And it would allow the State to challenge such a determination in a federal court before the Agencies assert jurisdiction based on the determination. These important safeguards would go some way to protecting state interests against broad assertions of federal authority, such as those claimed in the WOTUS rule, that violate the CWA and impinge on the States' traditional authority over land and water use. Again, however, we believe that the plurality opinion in *Rapanos* establishes the outermost bound of permissible federal jurisdiction under the law.

* * *

We appreciate this opportunity to provide our views on this important matter to the Agencies. We encourage the Agencies to continue to engage with States and state agencies throughout the rulemaking process. We look forward to working with the Agencies in the future on these important issues for the citizens of our States.

Sincerely,

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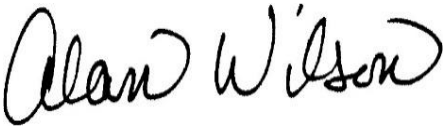

Alan Wilson
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